

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	15-CR-00637(KAM)
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	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	
EVAN GREEBEL,	:	Friday, October 6, 2017
	:	2:00 p.m.
Defendant.	:	
	:	
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TRANSCRIPT OF CRIMINAL CAUSE FOR PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 (In open court.)

2 (Judge KIYO A. MATSUMOTO enters the courtroom.)

3 THE COURT: Good afternoon, please have a seat.

4 THE COURTROOM DEPUTY: This is a final Pre-Trial
5 conference in Docket 15-CR-637, United States versus Evan
6 Greebel.

7 Will the Government's attorneys state your
8 appearances, please.

9 MS. SMITH: Good afternoon, Your Honor.

10 Alixandra Smith for the Government and with me are
11 Assistant United States Attorneys David Pitluck and David
12 Kessler along with paralegal Gabriela Balbin and special
13 agents Matthew Mahaffey and Sean Sweeny.

14 THE COURT: Thank you, good afternoon.

15 MR. BRODSKY: Good afternoon, Your Honor.

16 Reed Brodsky on behalf of Evan Greebel, who is with
17 us. At counsel's table is Randy Mastro, also from Gibson
18 Dunn, as well as my colleagues, Winston Chan, Mylan
19 Denerstein, Joshua Dubin and Grace Tsou.

20 THE COURT: All right. Thank you.

21 Good afternoon.

22 MR. BRODSKY: Thank you, Your Honor.

23 THE COURT: I am here to hear argument on the
24 numerous motions. I will say that I am somewhat dismayed that
25 the parties have just continued, despite my pre-trial orders,

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1 to pummel the Court with documents for me to decide in advance
2 of this trial that is coming up. I thought maybe the first
3 thing we should do is talk about jury selection.

4 I had asked that the parties try to confer on
5 particular questions which I think should focus exclusively,
6 for purposes of a questionnaire, on juror hardship or
7 availability. I think that way we could save a lot of time.

8 So, for example, if a juror is not going to be able
9 to be paid for his or her service by his or her employer, or
10 if a juror has plans to be unavailable because of medical
11 conditions or care or procedures or because of vacations, that
12 we should excuse those jurors.

13 What I am proposing, we have 200 jurors coming in on
14 Monday the 16th for selection. I would ask the Government to
15 undertake the labor of printing 200 juror questionnaires with
16 the number 1 through -- why don't you just go up to 300, in
17 case.

18 I do not think the other questions that the defense
19 is proposing regarding their knowledge about Mr. Greebel and
20 his associations with Mr. Shkreli are going to be helpful in a
21 questionnaire form. I think that to the extent we have jurors
22 who would clear the first hurdle of availability and hardship,
23 they could be examined at side-bar or in open court if they
24 have issues, or if the parties wish me to inquire about any
25 views a juror may have about Mr. Shkreli.

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1 MR. BRODSKY: Your Honor, Josh Dubin from Dubin
2 Consulting, whose pro hac motion is pending before Your Honor,
3 has done extreme analytic -- great analytics with respect to
4 the media coverage relating to Mr. Shkreli. And if we could
5 ask you for a few minutes of his time that, he could present
6 to Your Honor, perhaps, an explanation of why we were just
7 making the additional request of a few questions relating to
8 Mr. Shkreli.

9 THE COURT: All right. I will hear from him.

10 MR. BRODSKY: Thank you, Your Honor.

11 MR. DUBIN: Thank you, Your Honor.

12 May I approach and use the lectern.

13 THE COURT: You may stand wherever you wish.

14 MR. DUBIN: Thank you, Your Honor. I will try to be
15 brief.

16 I have a proposed order if you would like --

17 THE COURT: Hand it up to the Government and hand it
18 up to me, please.

19 MR. DUBIN: Just for my pro hac admission.

20 (Pause in the proceedings.)

21 MR. DUBIN: Your Honor, briefly.

22 We have one minor concern with only having a
23 questionnaire that deals with hardship. As the Court is
24 aware, we filed a motion for a jury questionnaire and/or
25 individual voir dire back in August. I'm sure the Court is

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1 painfully aware that this case has, and continues to receive,
2 an extensive amount of media coverage.

3 Since we filed that motion alone, there have been 78
4 articles just in New York papers; the Times, the Daily News.
5 If it will assist the Court, and I will hand a copy to the
6 Government, this is just a chart that shows, just since filing
7 our motion, how many articles have appeared in the Post, the
8 Daily News, the Times, the Wall Street Journal and Newsday.
9 Not a single one of these articles is good for Mr. Greebel.

10 THE COURT: Well, do they mention Mr. Greebel?
11 How many of these mention Mr. Greebel?

12 MR. DUBIN: I can endeavor to find out.

13 THE COURT: That would be important for me to know.

14 MR. DUBIN: Okay. And in my last count, and I don't
15 want to be held to it, I think more than half of them, but I
16 will endeavor to find out and make them available to the Court
17 before this hearing is over.

18 Without belaboring the point or reiterating all of
19 the arguments we made in our motion for a jury questionnaire,
20 we don't know quite how to handle this avalanche of media
21 coverage that continues to this day. And I know that the
22 Supreme Court has recognized that it's inadequate voir dire to
23 find out what the bias is. And our concern is that the only
24 way for there to be an adequate voir dire, in order for us to
25 really find out what the potential jurors' bases are, is to

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1 have an extensive questionnaire.

2 And my concern is that only including questions
3 about hardship, is going to syphon off a segment of the
4 prospective jury pool that just wants to get out of here. And
5 I understand that that happens, even if there's individual
6 voir dire, or a questionnaire. But I think that the anonymity
7 that the questionnaire provides, and sort of the candor that
8 prospective jurors often give in a questionnaire that they
9 sometimes feel intimidated being forthright about, even if
10 it's at a side-bar, is something that is just critical to
11 Mr. Greebel's Sixth Amendment right to a fair and impartial
12 trial, and I understand -- to a fair and impartial jury,
13 excuse me.

14 I understand fully, Your Honor, that the Court wants
15 to proceed in an efficient manner, but Mr. Greebel has waited
16 two long years to have his day here.

17 THE COURT: It could have been tried earlier, as you
18 know.

19 MR. DUBIN: Understood.

20 THE COURT: So do not complain about that, please.

21 MR. DUBIN: I'm not complaining.

22 THE COURT: All right.

23 MR. DUBIN: But I think that to take a couple of
24 extra days, if it takes that, to make sure that we exercise an
25 abundance of caution and include, even if it's just a subset

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1 of the questionnaires -- excuse me, of the questions that we
2 listed for the Court, are just critical, because they know of
3 Mr. Shkreli, I'm sure, people that have read press coverage
4 about it, in many different ways.

5 Some people don't recognize his name, but they
6 recognize him as Pharma Bro, or the greatest expletive in
7 America, the biggest expletive in America. There was just an
8 article in New York Magazine referring to him as that.

9 They know him as that guy that hiked the price of
10 the HIV drug. They know him in many different ways, and I
11 think that by having a questionnaire that addresses some of
12 these issues, that will speed up the process, so that we don't
13 have to be stuck with someone who, during the trial, says, you
14 know what, I didn't recognize him as Mr. Shkreli, or I didn't
15 recognize him as the guy that hiked up the price of the AIDS
16 drug, but oh, it's Pharma Bro. Oh, and this guy is accused of
17 being in a conspiracy with him?

18 We just fear that it is impossible, in the format
19 that I understand that the Court followed at the previous
20 trial, it is just literally impossible to get to true bias if
21 we don't have, at very minimum, a questionnaire that goes
22 beyond hardship.

23 And I think that, look, the Supreme Court recognizes
24 that there are certain cases that individual voir dire is
25 called for, and I'm very respectful of Your Honor's wide

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1 latitude in how voir dire should be conducted, but if there
2 were ever a case that cried out for it, this is it. The media
3 coverage has been more than, perhaps, any case I've ever been
4 involved in. And a lot of the trials that I've been involved
5 in have extensive media coverage. I've never seen anything
6 quite like it.

7 THE COURT: Well, assuming that we were to ask the
8 questions which you propose, which I believe is appended to
9 document 385-3 filed on September 28th, the questions you
10 proposed are:

11 "Martin Shkreli is a name you will hear in this
12 case. He has been referred to in the media as Pharma Bro.
13 Have you seen, read or heard anything about Mr. Shkreli in
14 newspapers, the Internet, on television, on the radio or a
15 magazine; yes or no? If yes, please describe what you have
16 heard or read."

17 And the next question. "If yes: Have you formed
18 any opinion about Mr. Shkreli; yes or no? If yes, please
19 explain."

20 It seems to me that a more effective and, perhaps,
21 useful way of teasing out juror bias would be to see them
22 answer that under oath in open court so you could look at
23 their reaction, and so that when they come to side-bar and
24 explain to you the details of this answer, they will not --
25 they will be less likely to withhold information.

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1 I think that the concern, obviously, in the last
2 trial was that jurors might be intimidated by saying what they
3 really thought, and that simply was not the case. In fact, I
4 think Mr. Shkreli's attorney complained that the jurors were
5 too candid.

6 And so it seems to me that we can ask those same
7 questions to the jurors in open court, and you would then have
8 an opportunity to come to side-bar and we could probe the
9 juror with further questions, and you could see how that juror
10 reacts.

11 You are the consultant. I mean, what is to be
12 gained by trying to discern a juror's views from a plain piece
13 of paper, when you can see them and we can ask questions and
14 look at their reactions?

15 MR. DUBIN: Because I think that in study after
16 study, and some of them were cited in our, I believe, our
17 motion for severance, but I can certainly provide them to the
18 Court, at the risk of drawing Your Honor's ire, I just simply
19 disagree; that it has been well-founded in social psychology
20 that people just feel intimidated by an authority figure
21 asking them questions and surrounded by strangers, and they
22 are just a lot less likely to be candid.

23 And I understand that Mr. Brafman said that they
24 were too candid. Those were for the ones that were candid.
25 Others, I would argue, did feel intimidated and might not just

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1 have been as comfortable to say what they would with the
2 seeming anonymity of a questionnaire medium or to write it
3 without an open room full of strangers where they have to
4 stand up.

5 Look, nobody is comfortable. It's just basic
6 psychology, saying I don't think I can be fair. What I've
7 read might affect me.

8 And, you know, I just respectfully disagree with
9 Your Honor. I think a questionnaire will certainly help tease
10 it out better, because someone will write on there how they
11 really feel without being surrounded by lawyers that they
12 don't know and, you know, who they perceive to be, rightfully
13 so, an authority figure.

14 THE COURT: I think you run the risk with this first
15 question of having jurors who may never have heard of
16 Mr. Shkreli or Pharma Bro, or even Mr. Greebel, really. I
17 think there are little media reports about Mr. Greebel, except
18 in passing, perhaps.

19 And I understand that that is a concern. I am not
20 minimizing that. But what is then to stop a juror who hasn't
21 really heard of him, to go home that night and Google him and
22 try to find out more about him? I mean, from what I
23 understand in reading the media reports, the jurors in the
24 last case complied with my directives not to read the media,
25 and after the trial, when they were able to go back and read

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1 about Mr. Shkreli, some of them were upset.

2 So I just think that there is, you know, by asking
3 these other questions on a jury questionnaire, the benefit of
4 seeing the jurors' reaction, and assessing the jurors'
5 reaction, is going to be somewhat circumscribed. I am not
6 saying there would not be an opportunity for follow-up, but
7 suppose a juror says, yes, I have heard of him.

8 Describe what you've heard or read. That he's
9 involved in some drug pricing issues.

10 Have you formed an opinion? No? Or yes?

11 I mean, how is that going to help you or how is it
12 going to save time to have that questionnaire answered?

13 MR. DUBIN: May I?

14 THE COURT: Yes, go ahead.

15 MR. DUBIN: Two things.

16 One, I think that we can certainly have an
17 admonition on the questionnaire -- and whether it's Your Honor
18 that does it, or the jury clerk that disseminates the
19 questionnaire -- instruct them that they are not to research
20 anything about the case from the time they receive the
21 questionnaire. So I think that that would take care of that.

22 Second, if somebody says, yes, I've heard about this
23 case. I've read about it and says, any incarnation of some of
24 the things that they said to Your Honor at Mr. Shkreli's
25 trial. I just want to strangle him; right? I don't like him.

1 Whatever they say. When they say, yes, I've read about it, I
2 think that there can be a process, and a very efficient
3 process that I've been through before, where the Government
4 and the defense can collaborate and trade lists of people that
5 are clearly going to be all for cause. And it would avoid
6 that process of having people come to side-bar, one after
7 another, after another.

8 There are going to be some people that clearly have
9 strong opinions about this case, and this has already been for
10 sort of a test drive, if you will, Your Honor. There are some
11 people that, you know, you saw them and they answered the
12 question and they're out. It's not even a close call.

13 And I think that -- and look, we understand that we
14 have to be reasonable and not waste the Court's time. So if
15 somebody says, look, I've read a few things about it, but,
16 anecdotally, and I don't think that it's going to be an issue.
17 The onus is on the defense to not say, well, we think that
18 person should be off, too.

19 But I think that there are just going to be some
20 clear-cut prospective jurors that aren't even a close call.
21 It will speed up the process and, you know, we can certainly
22 coordinate with the Government and agree to a very short
23 questionnaire that I think addresses our concerns about cause,
24 addresses our deep, deep concerns about Mr. Greebel's right to
25 a fair and impartial jury, and at the same time, include

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1 questions that the Government wants on there that, you know,
2 maybe they're not all of the question that we put in a
3 proposed questionnaire that get asked. But I think that the
4 Government probably has questions that they might want to ask
5 and I really do think it will speed up the process and address
6 our concerns.

7 THE COURT: Well, what it will mean is that the
8 questionnaires will have to be completed. They will have to
9 be copied. They will have to meet and confer. You will have
10 to decide which pile is excuse or not excuse, the juror goes
11 into, and then they're going to have to come back and go
12 through additional questions.

13 I am just wondering if I were to ask these questions
14 -- again, I guess I am not convinced that you would not get a
15 better clue about someone's thinking, if I were to ask the
16 questions and you would hear the answers, and be able to read
17 their body language or their facial expressions, or whatever
18 else you people do in choosing jurors. I think that a naked
19 page is going to be of less help and, ultimately, probably,
20 depending on these answers, you are going to want to see them
21 anyway at side-bar; right?

22 MR. DUBIN: No. I think there is some of them
23 that-- most of them that have read about this case and have an
24 opinion, it's not going to be pretty for Mr. Greebel.

25 Simple. I mean, the takeaway that we have seen from

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1 the media coverage, and we have done extensive analysis of the
2 coverage in this case, has all been awful. There hasn't been
3 a single article that says, you know what, we should give
4 Mr. Greebel the benefit of the doubt here, or Mr. Shkreli the
5 benefit of the doubt. It's been awful.

6 So I've done it in this courthouse before with Judge
7 Korman in the Murderer, Inc. case where we did a
8 questionnaire, and I think it sped up the process quite a bit.

9 Yes, there will have to be a meet and confer, and I
10 think we have to be reasonable and the Government will be
11 reasonable and I think we can get through it. And I don't
12 think it's just those questions. There would be enough
13 follow-up, a few other questions that we could ask, that would
14 give us the basis upon which to say, this person -- there's
15 no --

16 THE COURT: What are those other questions, because
17 I was just dealing with these questions that I thought was the
18 joint statement of the parties, as to what questions they
19 would want? I mean, don't start throwing in more questions.

20 MR. DUBIN: Oh, no, no, no, no.

21 THE COURT: What are you proposing?

22 MR. DUBIN: Can you indulge me one moment,
23 Your Honor, to grab a copy of it?

24 THE COURT: Okay.

25 (Pause in the proceedings.)

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1 MR. DUBIN: So there were two attachments to our
2 letter, as Mr. Brodsky just reminded me. Attachment A was
3 just about hardship. Attachment B was just about, you know,
4 bias as a result of reading about the case. So I don't think
5 that we would be asking to add too many, or if any, additional
6 questions.

7 THE COURT: Okay. I mean, that is what I thought we
8 were dealing with, was just these two.

9 All right. So Ms. Smith, or just one of the
10 prosecutors, what is -- what downside -- I mean, this might be
11 a more efficient way to proceed -- it might eliminate, I mean,
12 if somebody writes something very clearly biased, they are
13 gone, and we do not even have to bother to have them back.

14 MS. SMITH: Your Honor, I think we, you know, we
15 filed motions on this. So we made our position pretty clear.
16 I think that the way that voir dire was conducted during the
17 Shkreli trial, as you yourself just pointed out, you know,
18 resulted in a jury that actually did not know who Mr. Shkreli
19 was, and was able to be fair and impartial.

20 It did take us three days. It is hard for me to
21 see, having done a questionnaire myself, that this is going to
22 take less time because, as you said, it has to be passed out.
23 Then we have to take them. We have to make photocopies. We
24 have to pass them out to the defense. We all have to discuss.
25 I mean, it's going to be a full day just on the questionnaire

1 part.

2 And I think that the questions on -- I personally
3 think the questions are hardship are better done not on a
4 piece of paper, because I think that when you have four
5 questions about how to get out of jury duty, it kind of gives
6 the suggestion that this is the opportunity to do that. But
7 we're happy with the four questions that were submitted if the
8 Court wants to do that on the question of hardship.

9 The two additional questions that were included are
10 highly problematic in the way that they're drafted. I know
11 that they had a jury consultant do that for a particular
12 reason. But, for example, the question about Mr. Greebel
13 includes the date of his arrest, and the fact that he's an
14 attorney.

15 The question about Mr. Shkreli includes the fact
16 that there was a case against him, which suggests that he went
17 to trial, or might have gone to trial. I mean, it's very
18 suggestive.

19 And so if there are going to be two additional
20 questions on the defendant, it certainly could just be, as we
21 suggested for the Shkreli trial originally when we were
22 thinking about a jury questionnaire, just do you know this
23 person? If so, what have you heard?

24 Do you know this person? If so, what have you
25 heard?

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1 THE COURT: So one targeted toward Mr. Greebel and
2 one targeted toward Mr. Shkreli, and that is it.

3 MS. SMITH: Yes. And I think that in the joint
4 proposal that was in kind of the text of the letter, just like
5 a very basic question. Have you heard of Evan Greebel; yes or
6 no?

7 If so, what?

8 Have you heard of Martin Shkreli; yes or no? If so,
9 what?

10 THE COURT: What about the reference to Pharma Bro?

11 MS. SMITH: I think it's unnecessary. I'm not sure.
12 We didn't do that at the last trial. I don't know why you
13 would make that suggestion.

14 THE COURT: I mean, actually, we tried very hard to
15 talk to jurors about that during voir dire and advise them
16 that Mr. Shkreli is not on trial for drug pricing. At least
17 he was not being charged with that, and probing whether if the
18 door were to be opened and evidence came in, could they,
19 nonetheless, be fair and impartial, and set aside anything
20 they might have read or heard about or felt about drug
21 pricing.

22 So we really did try to not taint the jurors, but
23 rather to tease out any bias. We tried not to enhance or
24 inflame any coverage that Mr. Shkreli might find
25 objectionable. Obviously, I have no control over the press

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1 and I would not try to control the press on what they could
2 write.

3 But I do think that -- I think the Government's
4 proposing perhaps middle ground that, if I were you, I would
5 consider seriously.

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7 (Continued on following page.)

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1 (Continuing)

2 MR. DUBIN: Can I clarify briefly why? The only
3 reason we put Pharma Bro is because even when we described
4 this case, have you heard about this case, if you're talking
5 to someone you'd say, Have you heard of Martin Shkreli? No.
6 Have you heard of Pharma Bro? Oh, that's him?

7 It was just merely as a way that they could identify
8 their own knowledge of what they have read about the case.
9 But I hear what Your Honor is saying. It was merely as a way
10 to be able to identify who has read about the case and what
11 have they read, because if you just say Martin Shkreli some
12 people don't recognize it. If you say Pharma Bro, they might,
13 as the guy that's been referred to as the biggest so-and-so in
14 America. People say, Oh, that guy. It was just as a way to
15 identify, not to inflame.

16 And, respectfully, if it takes another day or two,
17 you know, the Supreme Court, and I think it was in the Morgan
18 case and the Litton case, has said -- I mean, this is the part
19 of the problem. I understand the wheels of justice often
20 grind slow, but this is, you know -- there is a lot at stake
21 here for Mr. Greebel and if we take an extra day --

22 THE COURT: There is a lot at stake for every
23 defendant, sir.

24 MR. DUBIN: Understood.

25 THE COURT: And I am not minimizing Mr. Greebel's

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1 interest in having a fair and impartial jury --

2 MR. DUBIN: Understood.

3 THE COURT: -- which is a right and something that I
4 strive for in every case.

5 MR. DUBIN: Understood.

6 THE COURT: It is no different.

7 MS. SMITH: And, Your Honor, the Government doesn't
8 have any objection to exploring these things at voir dire.
9 I'm not sure if Mr. Dubin is aware that when we are discussing
10 these questions, they are at individual voir dire at sidebar,
11 so they are not up in front of a room of strangers.

12 MR. DUBIN: I am aware.

13 MS. SMITH: And we did, in fact, speak to every
14 juror in the Shkreli trial. I am not suggesting that we don't
15 do a questionnaire because it might take more time. I just
16 think all in, you know, the process that we did last time
17 allowed us to actually speak to every juror and get the
18 reactions that Your Honor is talking about without taking the
19 additional time of a questionnaire. And I'm just not sure
20 what it adds, other than the hardship of knocking people out
21 who have a vacation when you are going to want to follow up
22 anyway because the question is, of course: Given what you
23 know, can you still be fair and impartial?

24 MR. DUBIN: I think what it does is it gets rid of,
25 Your Honor, people that have a clear bias. And I attended

1 part of Your Honor's jury selection at the prior trial and I
2 know it was done at sidebar, but there were a lot of people.
3 There was a long line of them lining up to tell you about what
4 they read about the case and all the things they didn't like
5 about Mr. Shkreli, and I think that it eliminates that
6 process. And I think that, in the end, we might end up taking
7 the same amount of time, but I certainly didn't mean to
8 suggest that Mr. Greebel has more at stake than any other
9 defendant. I'm just saying that the media coverage in this
10 case is anomalous.

11 THE COURT: I don't know what kind of media coverage
12 there will be in this case. I have a sense that the media is
13 not as interested in this case as they were in Mr. Shkreli. I
14 don't think Mr. Greebel has sought media attention in the same
15 way that Mr. Shkreli has. And so I understand your concern,
16 that he has been charged in an indictment with Mr. Shkreli,
17 but you have a separate trial and I think we can proceed in a
18 way that will ensure his right to a fair and impartial jury.

19 I am going to suggest that the Government maybe
20 consider what you had said earlier, and I think you can as
21 well --

22 MR. DUBIN: Very well, Your Honor.

23 THE COURT: -- on behalf of Mr. Greebel that we ask
24 those two additional questions. Have you heard of
25 Mr. Shkreli? If so, what? And I think that, perhaps, maybe

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1 asking what their opinion is based on what they have heard.
2 Even if they have heard something and have an opinion, the
3 question is can you set aside your opinions or what you have
4 heard or read and be fair and impartial. So we are going to
5 want to talk to these folks anyway, aren't we?

6 Unless someone is clearly --

7 MR. DUBIN: I think that there are going to be some
8 opinions that are hard to set --

9 THE COURT: Well, there always are.

10 MR. DUBIN: -- but I think, Your Honor, there are
11 some opinions that are hard to set aside. There just are.

12 THE COURT: Well, then they will be excused, right?

13 MR. DUBIN: Yes, and I think if we can add -- we can
14 agree with that middle ground, I believe.

15 THE COURT: All right, well, why don't you do this,
16 why don't you propose something for me?

17 MS. SMITH: Your Honor, we are fine with the four
18 questions we had and the two additional ones. I just don't
19 know want to have this be a whole additional set of briefing,
20 I would rather just decide it here.

21 THE COURT: Yes, okay.

22 MR. DUBIN: Yes.

23 THE COURT: What about Exhibit C to this letter?
24 I'm thinking maybe we just delete the reference to Pharma Bro
25 because, honestly, it is not part of this case, and if a juror

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1 makes an association with Pharma Bro, I mean it is really not
2 charged and it is not going to be in evidence.

3 MR. DUBIN: I am fine not to ask the question on the
4 questionnaire, but it is our position that it's critically
5 important. Because some people -- we then run the risk, Your
6 Honor, of having someone seated on the jury that realizes
7 during the trial that this is Pharma Bro or this is the guy.
8 It is merely there to try to jog people's memory or their
9 awareness of what they have or haven't read, and the headlines
10 rarely call him Shkreli. They often refer to him as Pharma
11 Bro or something else and it just won't identify. It doesn't
12 cast nearly a wide enough net. And believe me, Your Honor, if
13 we thought it was going to inflame prospective jurors, it
14 would be the last thing that we were going to ask.

15 MS. SMITH: Your Honor, I'd just point out that in
16 the trial of Martin Shkreli this was unnecessary. So this
17 just seems far afield of what actually needs to get done to
18 get a fair and impartial.

19 THE COURT: Well, I am inclined to have the hardship
20 questionnaire because, yes, some jurors might try to get out
21 of jury duty to answer these questions. They will be under
22 oath. We will have all the usual language about the penalties
23 of perjury and all of that, but we also will ask whether they
24 have heard of Mr. Shkreli. And if so, what they have heard
25 and what their opinions are; and we will do the same for

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1 Mr. Greebel and that will be it.

2 MR. DUBIN: Very well, Your Honor.

3 MS. SMITH: And, Your Honor, I just want to talk
4 about logistics then.

5 THE COURT: Yes.

6 MS. SMITH: So the jurors will come in on the 16th.

7 THE COURT: Yes.

8 MS. SMITH: They will fill out their questionnaires.

9 Are you going to have all of the individuals at the
10 table for the trial introduced to the jurors at that point, as
11 well? Are you going to do it in the ceremonial courtroom?
12 Just because we have to coordinate the copying and --

13 THE COURT: Right, I know. I think generally the
14 parties are present at all phases of the proceeding.

15 MS. SMITH: Right.

16 THE COURT: I don't think it is problem if some of
17 the lawyers aren't going to be present for that preliminary
18 meet-and-greet introductions, et cetera, but I will induce
19 everybody. We will swear the jury. I will emphasize the
20 importance of not sharing their answers and not discussing the
21 case amongst themselves or with anyone else and answering
22 truthfully, and then we will gather the questionnaires. And
23 we will ask you to make copies for the defense and the Court
24 and yourselves, and then you will let me show when you are
25 ready to proceed.

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1 MS. SMITH: Yes.

2 THE COURT: If there are issues where you disagree
3 as to whether a juror should stay or be excused, I will
4 resolve those, but I think, generally, you tend to work those
5 things out.

6 MS. SMITH: And just scheduling-wise, are you having
7 the jurors come back the morning of the 17th?

8 THE COURT: They might have to come back, yes.

9 MS. SMITH: No, are you going to have them sit
10 during the jury questionnaire process? Because depending on,
11 I mean it needs to be copied, everyone needs to look at them,
12 we need to go through them, then we need to meet. So are they
13 going to be called back? I am trying to get a sense of
14 timing.

15 THE COURT: What we thought we would do, and I don't
16 know how long it would take you to make those copies, but what
17 I would like to do is keep them here, send them back to the
18 jury room, we then figure out, once you have the
19 questionnaires copied and distributed among the counsel, we
20 will figure out who is excused and who stays.

21 MS. SMITH: Okay, so just all in one day? Because
22 we've done it both ways, having them come in and come back.

23 THE COURT: Right, I think that was a longer
24 questionnaire.

25 MS. SMITH: It was, yes.

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1 THE COURT: It was a more difficult situation and we
2 had far more questions.

3 MS. SMITH: Okay, so I will make sure we are
4 prepared to copy and bring them back as quickly as possible.

5 THE COURT: Thank you. And then, hopefully, we can
6 start the actual individual voir dires --

7 MS. SMITH: In the afternoon.

8 THE COURT: -- in the afternoon.

9 MS. SMITH: Okay.

10 MR. DUBIN: Your Honor, would be it be okay to add
11 an admonition on the questionnaire? Once they've filled out
12 the questionnaire, our concern would be that their curiosity
13 gets the best of them and they start looking on their phones
14 in the jury room, that they should not --

15 THE COURT: They are not going to have their phones.

16 MR. DUBIN: Oh, that's true.

17 THE COURT: Nobody in this courtroom should have
18 their phone --

19 MR. DUBIN: Got it, you're right.

20 THE COURT: -- or should be using them, except for
21 lawyers.

22 MR. BRODSKY: Your Honor, with respect to logistics,
23 I'm sorry to jump in on this, in one of your pretrial orders
24 you had indicated that we would begin on the 16th if we had
25 chosen a magistrate judge for jury selection and the 18th

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1 before Your Honor. We were choosing before Your Honor and not
2 the magistrate judge, with all respect to the magistrate
3 judges, so we didn't bring this up because we understood we
4 were starting on the 18th.

5 The 16th is Simchat Torah and that presents just an
6 issue for our side in light of that. We would have brought it
7 up earlier, but --

8 THE COURT: Well, so you are saying Monday, the 16th
9 is a holiday, so we can't select a jury on that date?

10 MR. BRODSKY: What I would suggest, Your Honor,
11 given what we had understood the proceeding would be, this is
12 just a suggestion.

13 THE COURT: Well, we were going to select the jury
14 on the 16th anyway.

15 MR. BRODSKY: What I suggest is that in the
16 ceremonial courtroom the questionnaires are handed out or in
17 the jury room the questionnaires are handed out to the 200 or
18 so jurors. The jury clerk or Your Honor instructs them not to
19 read the Internet. You can read them the instructions. They
20 fill it out. Then, we are certainly okay to take the burden
21 if the Government doesn't want to take the burden of making
22 the copies, we will make the copies or we can join them in
23 making the copies. That night, just a suggestion --

24 THE COURT: I just envision you sitting at the copy
25 machine.

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1 MS. SMITH: Your Honor, I am just confused because
2 we have always been choosing a jury on the 16th.

3 THE COURT: I know.

4 MS. SMITH: Is this just because you would like the
5 questionnaires overnight?

6 MR. BRODSKY: No, no, that's not it at all.

7 MS. SMITH: Okay.

8 MR. BRODSKY: Re-reading Your Honor's pre-trial
9 order, we actually put in our trial subpoenas to people that
10 the returns had to be on the 18th because we understood --

11 MS. SMITH: Yes, because that's when the openings
12 were starting, but not when we were choosing a jury.

13 MR. BRODSKY: Well, what we understood, Your Honor,
14 from Your Honor's order, and with all respect to the
15 Government, is that you had said the 16th before a magistrate
16 judge for jury selection, the 18th before Your Honor for jury
17 selection. So what my suggestion is, in light of the fact
18 that this is coming up for the first time, is the
19 questionnaires be distributed on the 16th. They're filled
20 out. We meet and confer and try to eliminate as many of the
21 obvious ones who are prejudiced and biased.

22 THE COURT: Well, are you not going to be present on
23 the 16th?

24 MS. SMITH: Yes, I am confused.

25 THE COURT: That is news to me, honestly, because

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1 whether or not I select or a magistrate judge selects, the
2 parties are present at jury selection.

3 MR. BRODSKY: We are a little bit concerned, Your
4 Honor, in light of Simchat Torah to eliminate some of the
5 potential jurors who don't show up on the 16th.

6 MS. SMITH: But they have to show up on the 16th to
7 fill out the questionnaires, so I am very confused.

8 MR. BRODSKY: Right. What I would suggest,
9 respectfully, because of Simchat Torah is to put it on for the
10 17th then for the questionnaire. We are concerned that some
11 of the jury pool will not be there because it's Simchat Torah
12 and we wouldn't want to eliminate some of the jury pool as a
13 result of landing on a Jewish holiday. There is a large
14 Orthodox community. There is a Jewish community, a
15 significant Jewish community in the Eastern District.

16 THE COURT: I know that, and they would let the jury
17 folks know when they call him. I want 200, so I am going to
18 get 200.

19 MR. BRODSKY: Understood, Your Honor.

20 THE COURT: And they are expected to be here and if
21 they have a reason not to come, they are going to work that
22 out with the jury clerks.

23 Do you have a copy of my pretrial order? I just do
24 not understand --

25 MR. BRODSKY: I suppose what I am saying --

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1 THE COURT: -- how there could have been an
2 ambiguity about the jury selection date.

3 MS. SMITH: Your Honor, the Government is just
4 confused. Is it a problem with defense counsel or is it a
5 problem with the jury --

6 MR. BRODSKY: I am looking at the order, Your Honor.
7 The way I read the order, and I apologize, Your Honor,
8 was that --

9 THE COURT: Just read it into the record just so I
10 can be refreshed.

11 MR. BRODSKY: It says: The defendant in the above-
12 captioned criminal case interposed a plea of not guilty. The
13 parties are directed: (1) to appear with counsel ready to
14 select a jury and to try the case and to have available
15 witnesses and exhibits on October 16th, 2017 at 9:00 a.m.
16 United States Courthouse, 225 Cadman Plaza East, Brooklyn, New
17 York.

18 THE COURT: Mr. Brodsky, I know you are very
19 experienced and you are very smart, how could you
20 misunderstand?

21 MR. BRODSKY: I think it must have been a prior
22 order, Your Honor, I apologize. It must have been a prior
23 order.

24 THE COURT: Well, a prior order would have had a
25 different start date and it would not have been Simchat Torah,

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1 with all due respect.

2 MR. BRODSKY: Understood, Your Honor.

3 THE COURT: We had changed the trial date --

4 MR. BRODSKY: Understood.

5 THE COURT: -- because of this deference with --

6 MR. BRODSKY: Understood. I understand, Your Honor,
7 and I apologize for the confusion. I really do. My only
8 concern --

9 THE COURT: So you are saying go ahead with jury
10 selection without the lawyers for the defendant present?

11 MR. BRODSKY: I guess my only concern, Your Honor --
12 no, I am not suggesting that at all.

13 THE COURT: All right, so then you are saying the
14 jury selection has to be adjourned until there is not a
15 holiday or some other conflict, but I am just hearing about
16 this now. So --

17 MR. BRODSKY: Understood.

18 THE COURT: What are you asking?

19 MR. BRODSKY: Your Honor, because of my confusion,
20 that's why we're -- I apologize.

21 What I am asking for is given that it's Simchat
22 Torah, given that some of the potential jury pool in the
23 Jewish community would call in on the 16th or before the 16th
24 and say I can't make it because it's Simchat Torah, that we
25 start on the 17th with jury selection, all parties available,

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1 everybody present, and we just start on the 17th. I am just
2 trying to avoid the possibility that the significant members
3 of the Jewish community call in the week before and say, I'm
4 not showing up, it's Simchat Torah.

5 MS. SMITH: Your Honor, it's our understanding that
6 Simchat Torah starts on Thursday, October 12th, and ends on
7 Friday, October 13th, so I don't know if it's a different
8 Jewish holiday that you're thinking of.

9 MR. BRODSKY: One moment, Your Honor.

10 (Pause.)

11 MR. BRODSKY: Your Honor, the issue we have is
12 that -- you are correct, and the issue we have is that, as we
13 understand it, significant parts of the Jewish community leave
14 and they don't return and they can't fly on Saturday, so they
15 won't be returning.

16 MS. SMITH: Your Honor, this has changed. I thought
17 it was an issue with defense counsel and the defendant, but it
18 sounds like --

19 THE COURT: I want to have a situation and a
20 relationship with you, Mr. Brodsky, and your team that I can
21 trust and rely on.

22 MR. BRODSKY: No, I agree with that. I apologize,
23 Your Honor. I was told Simchat Torah. I apologize, Your
24 Honor. I do apologize.

25 THE COURT: So I understand that we have a very

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1 diverse community in the Eastern District. There are many
2 folks of many faiths and different religions. I would bet for
3 almost any day in a calendar year on a jury selection date you
4 are going to have a significant number of individuals who
5 observe a holiday.

6 MR. BRODSKY: I understand, Your Honor. I apologize
7 for confusing the Court.

8 THE COURT: I am concerned that if we keep
9 eliminating jury selection dates based on religious holidays
10 and the fact that some jurors may be observant and may not be
11 available for jury service, we could perhaps go through the
12 whole year without a single day when we can select a jury
13 because we would not want to eliminate other religions either.
14 This is not something that appears to be an actual religious
15 holiday, the 16th.

16 MR. BRODSKY: I got that wrong and I apologize, Your
17 Honor. I will withdraw the application. I apologize for
18 getting it wrong, I really do.

19 THE COURT: All right. Let's go forward then.

20 MR. BRODSKY: Your Honor, what we thought we would
21 do, we consulted the Government and they had no objection
22 because Mr. Mastro has to leave at some point early for a
23 prior engagement on Long Island.

24 THE COURT: Today?

25 MR. BRODSKY: We thought we would start with the

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1 motion to dismiss, if Your Honor was okay with that.

2 THE COURT: Anything you want.

3 MR. MASTRO: Thank you, Your Honor.

4 MR. BRODSKY: All right.

5 MR. MASTRO: Thank you, Your Honor. I am newer to
6 this proceeding, but I come here perhaps with a fresh
7 perspective. Your Honor, I wanted to be heard briefly on the
8 motion to dismiss Count Seven. I start on the basis that our
9 client is an innocent man and we intend to prove that at
10 trial.

11 THE COURT: You do not have to prove it. Do not
12 forget, the Government has the burden.

13 MR. MASTRO: I understand, but we intend to prove it
14 anyway, Your Honor. I want to say Evan Greebel should not
15 have to go to trial on Count Seven after what happened at the
16 Shkreli trial. He should not have to go to trial on Count
17 Seven after the case the Government presented there, the
18 representations it made to the jury there, the proof it
19 presented there.

20 As you know, Your Honor, you having witnessed that
21 trial, the Government alleged a conspiracy of two. It argued
22 to the jury -- the Government argued to the jury that Martin
23 Shkreli was the, quote, dominant person, even read to the jury
24 evidence of Martin Shkreli berating Evan Greebel and saying
25 that you embarrass me and calling him names and saying this

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1 wasn't -- the Government's words at closing; this wasn't Evan
2 Greebel. Martin was the dominant person in the relationship,
3 no doubt about it.

4 What happened at the end of that trial? The
5 conspiracy of two on Count Seven; Count Seven, a conspiracy to
6 defraud Retrophin. That was the allegation in the bare-bones
7 indictment.

8 THE COURT: Doesn't the indictment say Martin
9 Shkreli and Evan Greebel, together with others --

10 MR. MASTRO: It does, Your Honor. I'm coming to
11 that. Yes, that's the bare-bones pleading; that it's Martin
12 Shkreli and Evan Greebel together with others and then
13 boilerplate about defrauding Retrophin an nothing more.

14 Your Honor sat here on that case. Your Honor knows
15 what the Government argued to that jury was a conspiracy of
16 two, Shkreli and Greebel. In fact, not until rebuttal
17 summation was anyone else, Mr. Yaffe, even mentioned in
18 connection with this and Your Honor saw his testimony.

19 This is someone who had a consulting agreement who
20 testified he barely knew who Evan Greebel was and didn't deal
21 with Evan Greebel at all in connection with a consulting
22 agreement. He executed, with Martin Shkreli, off a template,
23 never had any dealings with Evan Greebel.

24 This brings us, Your Honor, precisely to the point
25 of the matter. Your Honor, I'm a former federal prosecutor.

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1 Apparently, the Government doesn't want me to mention that
2 again in this case, but we'll come back to that later.

3 THE COURT: I know who you are, Mr. Mastro. The
4 question is whether you get to mention it in front of the
5 jury.

6 MR. MASTRO: I understand. We're going to discuss
7 that. I was making a little joke, Your Honor.

8 THE COURT: And weren't you in the civil division?

9 MR. MASTRO: I was, Your Honor, but I also did
10 criminal case. I appreciate Your Honor's reference and I know
11 Your Honor was in the civil division, too.

12 THE COURT: And also in the criminal, so --

13 MR. MASTRO: It's a very distinguished tradition to
14 be in the civil division. I was also the acting chief, but
15 that's neither here nor there. We will come back to that.

16 Your Honor, the fact of the matter is that I
17 remember that one of the guiding principles in the U.S.
18 Attorney's manual was to, quote, prevent unwarranted
19 disparities. There is a huge disparity when the Government
20 presented a case, Martin Shkreli is the dominant conspirator
21 in a conspiracy where the Government argued a conspiracy of
22 two and only mentioned a third party who could not possibly
23 have conspired with Evan Greebel because he had no dealings
24 with Evan Greebel.

25 The jury rejected that conspiracy charge against the

1 dominant party and now we are left with the Government saying
2 they intend to go forward anyway and apparently argue that
3 Shkreli was guilty. Well, they lost the Shkreli case.

4 THE COURT: Would you agree, sir, if they had been
5 tried together and if Mr. Shkreli had been acquitted and
6 Mr. Greebel had been convicted of Count Seven that the courts
7 would not find a reason to upset the inconsistent verdicts.
8 It is not ideal, but there is case law that would not set
9 aside the guilty verdict in such a situation; would you agree?

10 MR. MASTRO: I wouldn't agree with that, Your Honor,
11 for the following reason: This case presents that unique
12 situation where the only evidence that was presented to the
13 jury was a conspiracy of two. This is very much like the
14 Batista case, Judge Irizarry, right in the Eastern District.

15 Based on Rodriguez, where Judge Irizarry concluded
16 two defendants go to trial -- in fact, the case is even more
17 compelling here than in that case. Two defendants go to
18 trial. The lesser player, not the dominant player, is the one
19 who gets acquitted. The Government's theory of the dominant
20 player, Batista, he is convicted and the Government mentions
21 in that case a third potential co-conspirator who testifies
22 for the Government in the case and says repeatedly that
23 Batista did not encourage him to conspire to obstruct justice.

24 So what does Judge Irizarry do after that case, the
25 very situation that Your Honor just posited to me? Judge

1 Irizarry entered judgment dismissing the conspiracy charge,
2 the conviction of Batista because the jury found the other
3 defendant acquitted, so they couldn't have conspired together,
4 and found that the only other party mentioned as being
5 involved in the conspiracy, in fact, he exonerated Batista.
6 Your Honor, that's exactly what we have here.

7 THE COURT: What you are doing, though, is you are
8 asking me to preclude the Government from making its case.
9 They do not agree that the only conspirator in this Count
10 Seven conspiracy are the two. The Government has represented
11 that, I believe, if I understand the position, that there are
12 other conspirators, and Judge Irizarry decided the Batista
13 case after she heard the evidence on a Rule 29 motion and I
14 don't know what other evidence they have.

15 They have stated in their papers that they have
16 other evidence that they intend to offer on Count Seven
17 against Mr. Greebel that was not offered in the Shkreli case.

18
19 (Continued on following page.)
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1 (Continuing)

2 MR. MASTRO: I respectfully suggest, Your Honor --
3 and I say this very respectfully -- against the dominant
4 player, they held back all this great evidence and didn't
5 present it to that jury and he gets acquitted? But now they
6 get a do over and they're going to say, now I'm going to
7 present new evidence of other people? I don't think so,
8 Your Honor.

9 And I think this -- and I think it's very clear from
10 Rodriguez and otherwise, Second Circuit, that they do not get
11 to argue any longer that Martin Shkreli was a co-conspirator
12 with Evan Greebel. There should be a jury charge that says
13 they cannot find conspiracy about Evan Greebel -- if you're
14 going to allow this to go to trial -- against Evan Greebel,
15 that he conspired with Martin Shkreli, because they lost that
16 case. They don't get to do that over, and that's exactly what
17 in Rodriguez, Judge Nickerson did. He charged the jury that
18 the co-conspirator who the charges were dismissed against,
19 that the jury could not base a conspiracy charge against
20 Rodriguez on a conspiracy with that individual.

21 But I submit to Your Honor that if there was this
22 great evidence of someone else having been involved -- and
23 again, the only other person they mentioned at any point in
24 the Shkreli trial, the trial against the headliner, the
25 marquee player, the dominant party, the Government's words,

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1 that was a reference to Yaffee in rebuttal summation.
2 Your Honor heard it all. I'm not telling Your Honor anything
3 you don't know, and that Yaffee testified he barely knew who
4 Evan Greebel was and had no dealings with him. So they can't
5 have been the co-conspirators.

6 The Government doesn't get a do over. This is about
7 fairness and justice, Your Honor.

8 THE COURT: I understand. But, you know, conspiracy
9 law does not require that every member of the conspiracy have
10 dealings with, or have knowledge of, every other
11 co-conspirator.

12 MR. MASTRO: But Your Honor, that's not -- in this
13 unique circumstance, the evidence, the only evidence is
14 Shkreli and Greebel. Shkreli dominant party, and acquitted,
15 and a third person who had nothing to do with Evan Greebel.
16 So you have to find that Evan Greebel conspired with some
17 third-party now. Not with Shkreli.

18 The acquittal was Shkreli isn't a conspirator now.

19 THE COURT: I understand that.

20 MR. MASTRO: So they cannot possibly show, based on
21 the evidence you already know and heard, that Yaffee was a
22 conspirator with Greebel because Yaffee says he didn't -- he
23 basically didn't know Greebel, and he had no dealings with
24 Greebel.

25 So what is left? They are allowed now to come in

1 with whole new individuals they are going to suggest might
2 have been co-conspirators when, against the dominant party,
3 the mastermind of the conspiracy, the one they said pulled all
4 the strings and berated Greebel, and Greebel was, you know,
5 just the underling to the dominant player. They're going to
6 come in now here -- I'm talking fairness and justice,
7 Your Honor -- and they're going to say to that jury, okay,
8 Shkreli, can't say he was the one who was conspiring with.
9 Can't say Yaffee, because he didn't have anything to do with
10 Yaffee, Evan Greebel.

11 Now we are going to offer a whole bunch of new
12 people who were never even mentioned before in the first
13 trial? I don't think that's the way it's supposed to work,
14 Your Honor. I don't think that's fair and I don't think it's
15 just.

16 But in any event, I submit to Your Honor, they tried
17 their case against Shkreli. They lost their case. Even if
18 Your Honor is going to allow Count 7 to go to trial, which I
19 think would be a huge, with all due respect, a hugely unfair
20 thing to do to someone, who even the Government characterized
21 as the underling, not the dominant party. To make him go to
22 trial on that when based on the evidence at trial that
23 Your Honor presided over, where they had every incentive to
24 prove every co-conspirator and lay it on as much as they could
25 to get the dominant party, the real target, and they failed,

1 and he was acquitted. For Evan Greebel to have to go to trial
2 now on that, and the Government constantly during this trial
3 to be saying they get a do over. And they will try to sneak
4 in that Martin Shkreli was a co-conspirator. They will try to
5 sneak in new names that never came up before.

6 And, Your Honor, they should be estopped from doing
7 that. We should be allowed to tell this jury that Shkreli
8 cannot be considered a co-conspirator of Evan Greebel because
9 he was acquitted, and the jury should be so charged from
10 inception of the case to end of the case, consistent with
11 Rodriguez.

12 But we believe, Your Honor -- and I know this has
13 been a hard-fought case on all sides, and it was a really
14 hard-fought case in Shkreli, I understand that. I'm just here
15 asking for fairness and something in the interest of justice.

16 They will go to Count 8. We are going to go to
17 trial on Count 8. We'll have it out there. But Your Honor
18 knows the evidence on Count 7, and I have to come now to a
19 second reason why Count 7 should be dismissed.

20 But Your Honor knows that evidence, knows how that
21 trial went for the Government, and what they had to say and
22 they shouldn't get a do over. And the only way that Evan
23 Greebel could get a fair trial if he has to go to trial on
24 Count 7, is for that jury to know that Martin Shkreli cannot
25 be considered his co-conspirator after the verdict in the

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1 prior case. And know that from inception.

2 Now, Your Honor, second point. The conspiracy to
3 defraud Retrophin. Supposedly has three elements that really
4 fall into two buckets. I know Your Honor knows them.

5 One is the conspiracy to defraud Retrophin because
6 of the movement of Retrophin shares. The second element of it
7 has to do with settlement agreements and consulting
8 agreements.

9 Now, Your Honor, let's take the first bucket.

10 The first bucket on transfers of Retrophin shares.
11 Your Honor knows the evidence. The Government had to show it
12 at the last trial. Private parties have Retrophin shares.
13 They transfer the shares to another private party who
14 transfers them to another private party. Your Honor, that's
15 their case. They're not saying anything differently now.
16 That cannot possibly be defrauding Retrophin since they
17 weren't Retrophin-owned shares in the first place.

18 THE COURT: Well, let's back up. I am sorry to
19 interrupt you --

20 MR. MASTRO: No problem, Your Honor.

21 THE COURT: -- but I think what I understood the
22 Government's case to be -- and the Government can certainly
23 correct me if I'm wrong -- but my understanding is that
24 Mr. Shkreli hand-picked individuals to receive Retrophin
25 shares. They either paid nothing, or they paid a penny a

1 share. The value that was supposed to be assigned to these
2 shares once the company went public, I believe, was three
3 dollars a share. So they got a huge discount. These shares
4 purportedly to reward Retrophin employees so there was
5 consideration; i.e., work to bring Retrophin public in
6 exchange for these shares that were provided to them at
7 Mr. Shkreli's request for one penny a share, when he could
8 have traded them for \$3 a share.

9 And then when the Retrophin employees were in
10 possession of those shares, there were attempts made to
11 distance themselves and to make it appear as though they were
12 not affiliated with Retrophin. They were instructed not to
13 use Retrophin's e-mails. They were instructed to -- you can
14 work in the office, but you're not really an employee. And
15 then at some point Mr. Shkreli requested that those shares be
16 transferred to him.

17 There is no evidence that there was consideration,
18 paid for those shares. So certainly if they were shares to
19 which a true shareholder weren't entitled, you would think
20 that there would have been payment of consideration, but there
21 was none, I don't believe.

22 I mean, I think the evidence -- what you are doing
23 is you are taking one link in a chain, that is the conspiracy,
24 and you are saying based on this link it is impossible --

25 MR. MASTRO: I am not, Your Honor. And Your Honor

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1 has an excellent memory, but I believe what Your Honor is
2 describing, is the Government's allegations concerning
3 Count 8, and a conspiracy to commit securities fraud by
4 movement of shares and manipulation of markets.

5 It is not Count 7, Your Honor. Count 7 is
6 conspiracy to defraud Retrophin by transfers of shares that
7 were already privately held, transferred to another private
8 party, and then transferred to a third private party, or
9 parties.

10 Your Honor, that is not the manipulation of the
11 stock price that Your Honor is describing, and we'll prove
12 that that didn't happen. But that's Count 8.

13 Count 7 has these elements. A fraud of Retrophin.
14 A fraud of Retrophin. Not securities fraud. Fraud of
15 Retrophin. One. The share movement. The share movement is
16 from one private party to another to another. That can't
17 possibly have defrauded Retrophin.

18 THE COURT: How did that first private party get the
19 shares?

20 MR. MASTRO: Your Honor, there were privately held
21 shares.

22 THE COURT: Well, why don't we talk about how that
23 -- the first private party that you claim.

24 MR. MASTRO: Martin Shkreli and two other
25 individuals owned the shares at inception, and it was shares

1 from those groups. They owned the shares already. They were
2 the ones that were moved in sequence.

3 And, Your Honor, the allegation that that could have
4 defrauded Retrophin when they were privately held, it just
5 cannot possibly be. Those, I believe are the facts,
6 Your Honor.

7 Now, Count 8, Your Honor has articulated, the
8 Government's theory of Count 8, and we will address that with
9 the jury and we will debunk it then. But Count 7 is a
10 defrauding of Retrophin. And the Retrophin shares were not,
11 you know, held by Retrophin. They were privately held as they
12 transferred from one private party to another.

13 Now, the second part of this -- and we've described
14 this, Your Honor, in our briefing on page 14 and we described
15 the sequence of the shares.

16 Now, Your Honor, the second part of this is the
17 notion that settlement agreements and consulting agreements
18 defrauded Retrophin. But as Your Honor knows that the
19 Government's theory is that they shouldn't be disclosed to the
20 board. They weren't disclosed. There was a defrauding of
21 Retrophin in the process; that's the Government's theory.

22 Your Honor knows what the facts are in this regard,
23 and the fact of the matter is that Your Honor questioned the
24 Government about what -- where they said the legal duty
25 emanated from to have had such disclosures. The Government

1 told you Delaware general corporation law 144. Your Honor
2 read that and ruled that's not what it says.

3 The settlement agreements were ultimately something
4 that was surfaced at the board level and I know Your Honor
5 knows that, as to the settlement agreements, that they were
6 general releases to multiple parties, including Retrophin, of
7 any and all claims. The consulting agreements obligated
8 individuals to, you know, make themselves available as
9 consultants, sophisticated investors, some of them doctors and
10 in the pharmaceutical field, available. Retrophin, in that
11 instance, got the benefit of the bargain. It got general
12 releases of all claims.

13 THE COURT: What about the Government's argument
14 that Retrophin did not bargain because they were unaware that
15 this negotiation between Mr. Shkreli and his MSMB Capital and
16 Elea Capital investors was going on? He was bargaining, but
17 this was not a Retrophin bargain.

18 MR. MASTRO: Well, Your Honor knows what
19 Mr. Shkreli's role was at Retrophin and that he also was one
20 of the three board members and Your Honor knows that, through
21 a process of accounting and auditing and reconciliation, that
22 those agreements were ultimately disclosed and ratified. So,
23 from our perspective, Your Honor, I think to base a defrauding
24 of Retrophin case on that record, where you have a CEO and
25 board member involved in negotiation, where there is the

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1 benefit -- this is a fledgling, you know, a start-up. To have
2 those kind of claims out there with a start-up, thank goodness
3 they didn't derail the start-up, because it made huge amounts
4 of money for their investor witnesses.

5 The fact of the matter is, Retrophin got the benefit
6 of the bargain of general releases, got the benefit of the
7 bargain on consulting relationships with multiple parties.

8 THE COURT: What legal theories would there be for
9 an Elea Capital investor to sue Retrophin, or an MSMB Capital
10 investor to sue Retrophin? What would the legal theory be?

11 MR. MASTRO: Oh, I think Your Honor knows what was
12 going on at the time and --

13 THE COURT: I am asking you.

14 MR. MASTRO: Yes.

15 THE COURT: Just to articulate your view, the
16 defense view, as to what exposure Retrophin really faces.

17 MR. MASTRO: Two things. First of all, we know that
18 there were lawyers and parties who threatened to sue Retrophin
19 among the investors --

20 THE COURT: Sue Mr. Shkreli.

21 MR. MASTRO: And to include Retrophin, because
22 MSMB Capital and Retrophin, at the time, were undergoing a
23 restructuring and these parties knew of Retrophin's role and
24 if I were a party concerned about MSMB Capital, and knowing of
25 what the change that was occurring with Retrophin, the two

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1 having been managed together, I think, Your Honor, I would
2 have sued any party I thought I would have a right to sue.

3 THE COURT: Well, I think you are confusing
4 MSMB Capital with MSMB Healthcare. I think you meant to say
5 MSMB Healthcare, maybe; maybe?

6 MR. MASTRO: Your Honor, I certainly would have
7 included MSMB Healthcare.

8 I am a party who thinks that there's restructurings
9 going on of related entities resulting in Retrophin ultimately
10 being the place where one might actually end up being able to
11 get a recovery. I am thinking I'm entitled to recovery. I'm
12 going to -- like lawyers did and I know Your Honor saw this
13 evidence -- lawyers said, we're going to sue. Some lawyers
14 said we're going to sue everybody, including Retrophin. Of
15 course they did. And the evidence is there for that.
16 Your Honor saw it at the last trial.

17 So I simply submit to Your Honor that, both as to
18 the argument that the transfer of privately held shares from
19 one private party to another to another, could possibly be a
20 defrauding of Retrophin; it can't. And because of the lack of
21 any actual legal duty and the -- the fact that Retrophin
22 itself got the benefit of the bargain in those deals, you
23 should be dismissing Count 8 on those bases.

24 But, Your Honor, more importantly, Count 7 has these
25 multiple elements. It's not alleged as a single conspiracy.

1 They didn't allege a conspiracy about the settlement
2 agreements. They didn't allege separately a conspiracy about
3 the consulting agreements. They didn't allege separately a
4 conspiracy about the private transfers of shares, which they
5 claim defrauded Retrophin.

6 It's all glommed together. That is a defective way
7 to plead a conspiracy to defraud Retrophin. At a minimum,
8 those pieces Your Honor finds not well grounded, would have to
9 be dismissed and there is Second Circuit law that would
10 dismiss the entire count, because it combines together
11 different alleged conspiracies of, you know, differing
12 activities that do not hold up together. That's, Your Honor,
13 what we have to say about that.

14 I just want to come back for one second, Your Honor.
15 We're going to have a trial about Count 8 and what you
16 described on Count 8. But we implore Your Honor,
17 understanding the reality of what happened in the Shkreli
18 trial, understanding, I hope, now that the transfers of shares
19 referred to in Count 7 were one private party to another to
20 another, so that can't possibly be a defrauding of Retrophin,
21 because they weren't Retrophin-owned shares. That's Count 8.

22 Your Honor, Count 7 shouldn't be going forward
23 against Evan Greebel anymore. And in our sense of justice and
24 fairness, we implore the Court to intervene, as Judge Irizarry
25 intervened, and as Rodriguez counsels, that where you have a

1 tight group, here, two, at most, three, and Evan Greebel was
2 not the dominant player, the dominant player has been
3 acquitted, and the only other party ever mentioned in that
4 Shkreli trial had nothing to do with Evan Greebel. You cannot
5 possibly have a conspiracy count that goes forward.

6 So we really implore Your Honor. We look forward to
7 trying the case in front of Your Honor, but Count 7 should be
8 no part of this case. And if it is, we ask Your Honor to let
9 us tell that jury about Shkreli being acquitted, and just as
10 importantly, charging that jury that they cannot, based on
11 what's happened already, they cannot find that Martin Shkreli
12 is a co-conspirator of Evan Greebel. They should be told at
13 the outset of the case and at the end of case, just as Judge
14 Nickerson did in Rodriguez.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. KESSLER: Should I stand here or there?

18 THE COURT: Whatever you want to do.

19 MR. KESSLER: Sure. So these issues have been
20 briefed extensively. So I'm going to be extremely brief, but
21 I'll start where Mr. Mastro ended.

22 There is no request in the defendant's briefing for
23 a jury charge related to Mr. Shkreli's acquittal. So that's
24 something we're hearing the first time, but it's foreclosed by
25 the law. This is a different trial. That's what they wanted.

1 There's different evidence. We intend to introduce different
2 evidence. There's been litigation about the different
3 evidence. So we can set that aside.

4 The case law here, and the Court is completely
5 familiar with it and asks the question related to Acosta, is
6 such that even if Mr. Shkreli and Mr. Greebel had been tried
7 together, and Mr. Shkreli had been acquitted and Mr. Greebel
8 had been convicted, the same count that would not have been a
9 basis to dismiss the case.

10 There is no sort of challenge from the defense about
11 Acosta. They just talk about Rodriguez, which is a sort of
12 subspecies of Acosta, where Judge Nickerson held in a Rule 29
13 motion that there was insufficient evidence to conclude that
14 one of the co-conspirators was a co-conspirator. That's why
15 the whole question about were there other conspirators came
16 up.

17 Here there's been no Rule 29 motion, certainly in
18 this case. Not in the Shkreli case. There's been no judicial
19 determination, that I'm aware of, that there is insufficient
20 evidence to proceed with Mr. Shkreli as a co-conspirator.

21 THE COURT: May I just ask you a question, though.

22 MR. KESSLER: Sure.

23 THE COURT: I think that the question is whether you
24 do have other conspirators beyond Mr. Shkreli, Mr. Greebel and
25 Mr. Yaffee.

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1 MR. KESSLER: So, yes.

2 THE COURT: For Count 7.

3 MR. KESSLER: So, yes. But I believe the case law
4 doesn't need to ask that question.

5 THE COURT: Right. But just, you know, I guess
6 assuming that you do have other conspirators, I am just
7 concerned about the idea that I would have the authority to
8 dismiss a count outright at this point without allowing the
9 evidence to be vetted and admitted. And after the Government
10 rested on Count 7, and assuming the defense is right, that you
11 probably do not have more evidence because you would have
12 certainly presented it at the Shkreli trial, if you had it,
13 because I think the Government did argue that he was the
14 dominant party, Mr. Shkreli dominated Mr. Greebel, and we
15 certainly saw e-mails where he was very demeaning and nasty to
16 Mr. Greebel.

17 I think that, at that point, I would suppose, that
18 if they made a motion to dismiss for insufficiency, it would
19 be a more appropriate time rather than ask me, at this point.
20 Since I don't know what your proof is.

21 MR. KESSLER: I see what the Court is saying. Yes.

22 THE COURT: Yes. You represented that you have more
23 evidence and there are other conspirators beyond Greebel,
24 Yaffee and Shkreli.

25 MR. KESSLER: Yes. But I think the way I would

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1 frame the Court's question is that at the end of Government's
2 case, in this case --

3 THE COURT: Yes.

4 MR. KESSLER: -- there will be a Rule 29 motion, I
5 assume.

6 THE COURT: Right.

7 MR. KESSLER: And the Court will have before it the
8 evidence of whether there's sufficient evidence to proceed
9 with a charge to the jury that Mr. Greebel conspired with
10 Mr. Shkreli and the others. And that's the point at which
11 this question comes up.

12 But the record from the Shkreli case can't be
13 imported into this case before there's been a trial, evaluated
14 for whether there's sufficient evidence of Shkreli being a
15 co-conspirator, at this point, as if there had been a Rule 29
16 motion in a trial that hadn't happened.

17 Moreover, if there actually is such an analysis,
18 there is more than enough evidence to proceed to the jury with
19 Mr. Shkreli as a co-conspirator. I mean, the cases that we've
20 been discussing, Acosta, Rodriguez, they're all animated by
21 the principle that a jury can acquit someone for whom there is
22 sufficient evidence to bring the charge to the jury, and even
23 for reasons other than that the jury determined the Government
24 had not proven its case beyond a reasonable doubt.

25 I mean, without taking a position on any of the news

1 articles that Mr. Dubin talked about, I think everyone in the
2 courtroom is familiar that there are articles where jurors
3 from the Shkreli trial discussed possibly misunderstanding the
4 legal standard. That's, you know, double-jeopardy attaches.
5 No one's challenging the decision there. But that's just an
6 illustration of exactly why the law does not support the
7 argument that because a co-conspirator was acquitted in a
8 different case, with different evidence, you know, let alone
9 in the same case with the same evidence, that that's a basis
10 to dismiss a count in an indictment. It might be grounds for
11 a Rule 29 motion at the time that the Government's entered its
12 evidence.

13 So, I mean, I'm happy to answer other questions on
14 that point, but I think this issue has been --

15 THE COURT: Well, what about Mr. Mastro's
16 application that they be allowed to state to the jury that
17 Mr. Shkreli has been acquitted of the conspiracy in Count 7?

18 MR. KESSLER: There is no law to support that. It
19 is foreclosed by the case law. I assume, in any event, he'd
20 also asked that the jury be instructed that Mr. Shkreli was
21 convicted of conspiring with Mr. Greebel in Count 8, which I
22 don't think they're going to ask.

23 But this is far afield, Your Honor. The
24 Second Circuit case law, Acosta and Rodriguez, are completely
25 clear that there is no basis to dismiss a correctly pleaded

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1 indictment in this situation.

2 THE COURT: Well, let's get to their argument that
3 this is an indictment that alleges no harm, or charges no harm
4 to Retrophin, because the shares that were transferred as part
5 of Count 7 were not Retrophin's shares.

6 I just want to point out for the record that
7 paragraph 25 of the superseding indictment does allege that
8 Mr. Shkreli got the Retrophin shares that were backdated by,
9 quote, enticing those employees with the opportunity to
10 acquire for a nominal amount approximately 5 percent of
11 Retrophin's unrestricted or free-trading shares.

12 I think what I am understanding is that these
13 transfers were then the result of a promise to give employees
14 Retrophin shares. And the question is, are these -- those
15 shares were Retrophin property, I believe.

16

17 (Continued on following page.)

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1 (Continuing)

2 MR. BRODSKY: Your Honor, just to be very clear from
3 our side, in our motion paperwork, we were talking about with
4 respect to Count Seven. You charged the jury with respect to
5 three theories. You said there was an MSMB Capital theory,
6 there was a settlement theory and there was a consulting
7 theory. Your jury instructions are very clear to the jury
8 that if they found one of those theories to be true beyond a
9 reasonable doubt, they would convict him. The MSMB Capital
10 theory is the one we are focusing on, not the Fearnow shares
11 for Count Eight. And the MSMB Capital theory, assuming all
12 the facts that the Government says are true, including the
13 backdate, we are assuming it's all true as alleged by the
14 Government, it doesn't defraud Retrophin. The reason why is
15 that in February of 2012, when Martin Shkreli had these
16 alleged shares of Retrophin, he possessed them, he was the
17 dominant party of -- it was a private company. He held the
18 shares. He had the authority to give himself as many shares
19 as he wanted. He created the company. So he held these
20 shares. The Government does not say that Martin Shkreli
21 should not have held these shares. Marek Biestek held shares.
22 The Government does not say Marek Biestek was defrauding
23 Retrophin out of those share. Kevin Mulleady held shares.
24 Tom Fernandez held shares.

25 We fast forward several months and we go to November

1 9, 2012 where the Government alleges -- and we will take it
2 all as true -- the Government alleges that 4,167 shares of
3 Marek Biestek were transferred, backdated to Martin Shkreli
4 and they were backdated to a date in June. First it was July
5 with redacted dates and then it was June. Assume that's true.
6 Assume Martin Shkreli backdated that. And those shares should
7 really be in the hands of Marek Biestek.

8 On December 5th of 2012, we assume it's all true,
9 that the shares that Thomas Fernandez held and that Kevin
10 Mulleady held that were transferred to Martin Shkreli should
11 not have. But those are all individuals holding shares. And
12 assuming all the backdating is true, they were the only
13 shares, these 75,000 shares were transferred to MSMB Capital.
14 The Government's theory is legally impossible. If you assume
15 all of those facts to be true, Retrophin was not defrauded.

16 Our fear, Your Honor -- and, look, I don't know why
17 the Government is defending this theory because it's
18 reversible. I'm sorry to use the word. But it is reversible
19 error on appeal. These are three theories they're taking to
20 the jury and they're telling the jury and they're arguing to
21 the jury that Retrophin is defrauded, even though, as a matter
22 of fact, based on all their allegations and all the evidence
23 they submitted at the trial, individuals held the shares of
24 Retrophin. Nobody is accusing those individuals of defrauding
25 Retrophin. They are backdated transfers between individuals

1 and then they're sent to MSMB Capital. Retrophin is not
2 defrauded of any of those shares because they never held
3 possession of it. And that is why we say it's legally
4 impossible. And if this goes to the jury -- and the
5 Government wants to take this theory to the jury, we are
6 preserving it because we think they're making a fatal mistake.
7 They cannot -- in their reply papers and their opposition
8 papers, they never explain once why Retrophin was defrauded of
9 those shares, not once.

10 And during the trial of Martin Shkreli, when Ben
11 Brafman argued in summation that Retrophin was never
12 defrauded, there was no response in rebuttal. So, we
13 respectfully submit, under the MSMB Capital theory, Your
14 Honor, it is legally impossible, based on all of the facts
15 that they say, for Retrophin to be defrauded. That's our
16 argument.

17 THE COURT: Do you want to respond?

18 MR. KESSLER: So, this is all in our papers. But
19 very simply, the backdated shares create an interest that MSMB
20 Capital holds in Retrophin that it never had. That interest
21 is then used as a pretext to give Retrophin shares to various
22 investors. That's one of the reasons Retrophin is defrauded
23 through the backdating, setting aside there's no longer
24 dispute that the settlement agreements and consulting
25 agreements defrauded Retrophin.

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1 In addition, the evidence, we submit, is coming in
2 any way for a number of different reasons that are laid out in
3 the papers, including Mr. Greebel's knowledge. But there's a
4 legally viable theory that is pleaded on the face of the
5 indictment.

6 MR. BRODSKY: Your Honor, if I could just jump in
7 there. How does that defraud Retrophin?

8 THE COURT: Why doesn't he get to speak?

9 MR. BRODSKY: I apologize.

10 THE COURT: Your colleague got uninterrupted time.

11 MR. BRODSKY: I apologize, Your Honor.

12 THE COURT: Let's be courteous.

13 MR. KESSLER: Mr. Mastro also mentioned a duty to
14 disclose as a reason that the settlement agreement theory is
15 invalid. I assume Mr. Mastro and Gibson Dunn are not taking a
16 position that an attorney in New York State does not have a
17 duty to his client, a fiduciary to his client to disclose
18 material and information. There are Second Circuit cases on
19 that, there's New York State cases, there's Bar Associations
20 advisories on that. So there's certainly a duty to disclose
21 for Mr. Greebel. Mr. Shkreli had a duty to disclose. That
22 was addressed in the previous trial. There may have been
23 other duties as well. So we can move on from that.

24 The benefit of the bargain argument: The benefit of
25 the bargain issue only arise if there's a right to control

1 theory. That's not even the primary theory the Government is
2 proceeding on. Certainly Retrophin did not get the benefit of
3 any bargain. The only reason the investors were going to sue
4 Retrophin was because of Mr. Shkreli's fraud, including
5 through this backdating that created interest that didn't
6 exist. But these are evidence-based arguments. These are
7 closing arguments. These are jury arguments. The indictment
8 is pleaded properly on its face. If there's a concern with
9 multiple conspiracies later, there are multiple conspiracy
10 jury instructions. But there's one conspiracy charge, the
11 indictment lays out different steps that were taken in pursuit
12 of that conspiracy.

13 I am happy to answer any other questions.

14 THE COURT: All right. Mr. Mastro.

15 MR. MASTRO: Your Honor, very briefly. I heard some
16 things, that even for only somebody who was only in the civil
17 division, I found pretty shocking. I think it is pretty
18 shocking that Government is taking the position in this case
19 that it gets a do-over on Shkreli after the jury exonerated,
20 acquitted Shkreli of being part of that conspiracy. I find it
21 pretty shocking that the Government is going to take the
22 position that it gets to reargue to a second jury, after it
23 presented all of its best evidence against Shkreli and the
24 jury rejected a conspiracy count against Shkreli on Count
25 Seven, that it gets a do-over. The last time I looked the

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1 standard was that we can't make misrepresentations to the
2 jury. That's why I say to Your Honor there has to be the
3 ability to tell that jury, through charge or otherwise, that
4 they cannot find that Shkreli was one of the co-conspirators.
5 Now, why --

6 THE COURT: Is there authority for this instruction?

7 MR. MASTRO: Yes. Completely, Your Honor. It comes
8 right out of Rodriguez. Right out of Rodriguez. Rodriguez
9 stands for this proposition. The Court ultimately -- the
10 Second Circuit found that what Judge Nickerson did was fine
11 because this is what he did, Rodriguez. In this case -- this
12 is page 459 -- "In this case, the indictment charged
13 Rodriguez, Tavares and others with a narcotics conspiracy.
14 Judge Nickerson properly charged the jury that" -- because he
15 had dismissed the charges against Tavares as being a
16 conspirator -- "Judge Nickerson charged the jury that, quote,
17 In determining whether two or more persons knowingly and
18 willfully conspired, do not consider Tavares. In other words,
19 you must find beyond a reasonable doubt that two or more
20 persons besides Tavares knowingly and willfully conspired.'"
21 And he said, "You will recall that this count says that the
22 conspiracy was between Rodriguez, Tavares and others. You
23 cannot consider, in determining whether there is a conspiracy,
24 Tavares." And the Second Circuit ultimately concluded that,
25 you know, that stood because of the carve out of Tavares and

1 that instruction was given.

2 Now, Your Honor, I heard it said here that because
3 it was a jury verdict they get to do a do-over. That maybe
4 the jury had lenity or some other rationale for acquitting and
5 exonerating Shkreli of the conspiracy charge. Your Honor
6 knows darn well that this jury had no lenity for Shkreli. He
7 was convicted of very serious charges. He just wasn't
8 convicted of being a conspirator. He was convicted of being a
9 fraudster multiple times, but not of a conspiracy with Evan
10 Greebel or Mr. Yaffe on Count Seven to defraud Retrophin.

11 Now, Your Honor, the case law is clear and it is
12 what Judge Irizzary picked up on so clearly in the Batista
13 case, she held that while inconsistent conspiracy
14 determinations for same proceedings can be permissible, she
15 wrote so long as the indictment mentions others where,
16 quote -- and she is quoting Rodriguez -- "There is evidence
17 that the defendant conspired with others unknown." That's 459
18 from Rodriguez and that is Batista, page 11. In other words,
19 Your Honor, there has to be that evidence. It's got to be
20 somebody else that conspired with besides Shkreli.

21 THE COURT: How do we know now as we sit here
22 without hearing the trial evidence against Mr. Greebel there
23 isn't such a person?

24 I think the Government is saying, yes, if at the end
25 of the day, after the Government rests, if I find insufficient

1 evidence to support Count Seven, I am going to dismiss it.

2 MR. MASTRO: And, Your Honor, if that's all the
3 Government said, we might not be having quite the same
4 argument, although I still think as a matter of fairness and
5 justice this should be dismissed against Mr. Greebel, but
6 that's not all they said. They not only said we get to
7 present evidence of wholly new people we never even mentioned
8 to the Shkreli jury, but we get to retry Shkreli as a
9 co-conspirator. That is wrong. That is against Rodriguez.
10 It is against Batista and they cannot do it as a matter of
11 justice. This whole trial will be poisoned if they were
12 allowed to do that and this jury isn't told the truth that
13 they cannot take into account Martin Shkreli as a
14 co-conspirator. And they need to be told that at inception if
15 we're going to go forward to trial.

16 Now, Your Honor, also on Count Seven, Your Honor, my
17 colleague said it more passionately and concisely than I could
18 say it, but, Your Honor, it is the case that as to these
19 privately held shares what a convoluted theory. At the point
20 where -- the MSMB Capital theory is a theory about shares that
21 are at that point privately held and transferred from one
22 private party to another to another. It is legal
23 impossibility. There was no conspiracy to defraud Retrophin
24 by, at that moment in time, private parties transferring
25 shares from one private party to another private party. Could

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1 not have happened. Factually, it makes no sense. And if
2 Count Seven goes forward with that as one of the three options
3 to find even Evan Greebel guilty of conspiracy to defraud
4 Retrophin, that is also poisoning the well. I'm simply saying
5 to Your Honor --

6 THE COURT: I think it is just the transfers, it is
7 the backdating of the transfers that make it appear as though
8 it happened.

9 MR. MASTRO: But, Your Honor, even accepting the
10 backdating, it's private parties transferring to private
11 parties. That doesn't defraud Retrophin. Whatever other
12 evidence they intend to offer that for on Count Eight, that
13 doesn't defraud Retrophin one wit, whether they backdated
14 privately held shares to transfer them to some other private
15 party. It cannot possibly have done that. And you cannot
16 have a conspiracy to defraud Retrophin when this was being
17 done with privately held shares to other private parties.
18 Maybe they're going to introduce this in some other context.
19 So what? Let them try to get it on Count Eight. But it
20 doesn't come in on Count Seven and it's prejudicial if it
21 comes in on Count Seven and it will poison these proceedings.

22 I don't know why the Government is insisting on
23 going forward on Count Seven under these circumstances. I
24 don't know why it is not heeding the words of the U.S.
25 Attorney at the time of the Shkreli conviction. They're

1 gratified by the jury's verdict and they stand by it. But
2 they're not standing by it now and they're trying to get you
3 to go down a well that will destroy these proceedings from
4 inception. They should not be able to bring Count Seven
5 against Evan Greebel. They can't bring Count Seven unless
6 that jury knows from inception that it can't be a conspiracy
7 with Martin Shkreli that they find for Evan Greebel, he is out
8 of the picture. And it can't have been that one of their
9 three legs of the stool goes to the jury that private shares
10 transferred to private parties somehow defrauded Retrophin.

11 Thank you, Your Honor.

12 THE COURT: Well, with that, Mr. Mastro, let me ask
13 you about the Supreme Court's decision in Standefer versus
14 United States.

15 MR. MASTRO: Yes, Your Honor.

16 THE COURT: It was the same kind of estoppel
17 argument that was being made. They held that the Government
18 is not barred from relitigating the issue of whether the IRS
19 agent accepted unlawful compensation. They note that in a
20 criminal case the Government is without the kind of
21 opportunity to correct errors. They aren't able to appeal an
22 acquittal and argue to the appellate court that there were
23 errors in my rulings perhaps or that the evidence -- they make
24 arguments about the evidence, they don't have the right to a
25 review. And it seems to me that the Supreme Court in that

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1 case was reluctant to give an acquittal preclusive of that.
2 In fact, they so held.

3 MR. MASTRO: Yes.

4 THE COURT: So why doesn't that Supreme Court
5 decision govern my decision as to whether or not the
6 Government should be precluded from arguing that Mr. Shkreli
7 is involved in a conspiracy with Mr. Greebel?

8 MR. MASTRO: For the following reasons, Your Honor:
9 Non-mutual collateral estoppel as a result of the Standefer is
10 disfavored, not precluded. The Supreme Court made clear there
11 that because of the reach of the Government geographically and
12 so many related cases potentially around the country that
13 there were differences in applying collateral estoppel to the
14 Government in the normal course as it would be to private
15 litigants. But what has come out since is two things. The
16 law in this Circuit -- and the law in this Circuit as applied
17 to the kind of unique circumstances we present here -- there
18 is no geographic reach. It is the same U.S. Attorney's Office
19 under the same indictment charging two people as alleged
20 co-conspirators and, because of the severance, going to two
21 juries. But Rodriguez tells us that when you have
22 co-defendants and you have one who has been acquitted or
23 dismissed --

24 THE COURT: Acquitted by the judge based on
25 insufficient evidence, not acquitted by the jury.

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1 MR. MASTRO: Yes, and, Your Honor, I was coming to
2 that.

3 THE COURT: Okay. Because they do make that
4 distinction.

5 MR. MASTRO: The Supreme Court also made the point
6 it is not as easy to tell on a jury verdict as it is when a
7 judge rules. That's part of Rodriguez. It is not as easy to
8 tell whether the jury may have had some other agenda, some
9 other agenda like lenity for certain of the co-conspirators,
10 whether there was some other argument made to the jury,
11 incapacity or something like that. You know in this case none
12 of that applies. Martin Shkreli was public enemy number one,
13 the Government's dominant party. They told that jury this is
14 the worst guy. This is the leader of the conspiracy, the
15 dominant party, and he got convicted of multiple acts of
16 fraud. But guess what? He didn't get convicted of
17 conspiracy. And there is no other way to interpret that jury
18 verdict, based on the way both the Government and the defense
19 argued the case, that it could have been lenity, that it could
20 have been incapacity, that it could have been any other reason
21 other than they rejected the Government's conspiracy charge
22 and exonerated Shkreli in that respect when they otherwise
23 hated his guts. Now, Your Honor, that brings us --

24 THE COURT: The jury did not hate Mr. Shkreli's
25 guts. You get carried away. I appreciate your passion.

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1 MR. MASTRO: I know. I know. Your Honor, I'm
2 trying to make -- the point I'm trying to make is that there
3 isn't any question the jury was prepared to convict Mr.
4 Shkreli on very serious charges of fraud but not on conspiracy
5 with Evan Greebel. That's who they alleged he conspired with
6 to defraud Retrophin. They acquitted him on that. There is
7 no argument to be made that that was a matter of lenity
8 because Shkreli was alleged to be the dominant party. There
9 was no argument made at the trial that there was any other
10 reason other than the sufficiency of the evidence. That puts
11 us in the wheelhouse of Rodriguez and Batista. And, Your
12 Honor, if justice is going to be done here -- and I do argue
13 with passion, so please forgive me, Your Honor. But if
14 justice is going to be done here, fairness is to be done here.
15 This charge should either be dismissed against Evan Greebel or
16 that jury has to know it cannot, consistent with Rodriguez and
17 Batista, it cannot find that Evan Greebel committed conspiracy
18 on Count Seven with Martin Shkreli. Martin Shkreli has to be
19 taken off the table. Thank you, Your Honor.

20 MR. KESSLER: Your Honor, may I make one additional
21 point?

22 THE COURT: Yes.

23 MR. KESSLER: Martin Shkreli is a valid
24 co-conspirator for the upcoming trial. It is the trial of
25 Evan Greebel. It is the severed trial they wanted. There has

1 been no preclusive finding whatsoever that there is
2 insufficient evidence to proceed with Martin Shkreli as a
3 co-conspirator. The jury verdict cannot be interpolated with
4 mind reading to decide why they decided what they did. That's
5 what the Supreme Court says one should not be doing. What Mr.
6 Mastro is doing, and the Supreme Court points out in Powell,
7 which is after Standefer, and addresses the same issues,
8 inconsistent jury verdicts can either result in lenity or
9 mistake or comprise. That's the background here. So let me
10 just read the one portion of the sentence from Rodriguez that
11 Mr. Mastro did not read. What Rodriguez holds is that
12 superficially inconsistent conspiracy determinations in the
13 same proceeding resulting from -- and this is what was
14 omitted -- a judge's setting aside of a jury verdict against a
15 co-conspirator. That's permissible if there are -- the
16 Government can proceed if there are other co-conspirators.
17 That predicate, which Judge Irizzary did not address in
18 Batista. That part of the sentence is left out in the Batista
19 opinion. That's the issue here. If this had been the same
20 trial and they made a Rule 29 motion and you had determined
21 that there was insufficient evidence to proceed against Mr.
22 Shkreli, we would be in the Rodriguez situation. But there's
23 a separate trial. There is no record in this trial. The
24 Shkreli record amply supports a Rule 29 defeating level of
25 evidence to proceed against Mr. Greebel. That's the end of

1 the story. That's what the law says. That's what Acosta
2 says. I mean, Acosta, which has not been discussed, really
3 says -- it is the clearest sentence in the case -- if every
4 other co-conspirator is acquitted, the conviction against the
5 sole remaining co-conspirator. So we just wanted to be clear
6 that we intend to proceed with Mr. Shkreli as a co-conspirator
7 and none of these cases preclude that in any way that as a
8 matter of law. There may be evidentiary issues at the Rule 29
9 stage of the law.

10 MR. MASTRO: Your Honor, can I just ask one thing?

11 THE COURT: Yes.

12 MR. MASTRO: Your Honor, they have other
13 co-conspirators they want to name. We've heard it today there
14 are other names besides the ones. Have them tell us the names
15 because we are not aware of any. They didn't tell any of the
16 other jury when they were trying Shkreli, who they said was
17 the mastermind here. And we should have the right to know who
18 they are saying they are. Apparently they know them here.
19 Why don't they tell you? Because if they can't name anybody
20 else, then you'll know that it was just those two. I did tell
21 you that Rodriguez was a bench trial ruling and I read you
22 what Judge Nickerson did, which was to instruct the jury that
23 they could not find a conspiracy with the acquitted party, and
24 I explained to Your Honor why this particular jury verdict
25 under these circumstances is the equivalent of what Judge

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1 Nickerson did in the Rodriguez trial. So Your Honor, we ask
2 you for dismissal jury charge and, just as importantly, tell
3 us who it is, because I don't know of anybody else. So tell
4 us the names.

5 THE COURT: Ms. Smith.

6 MS. SMITH: Your Honor, I just wanted to point out
7 this argument about the jury charge, it's not one that was
8 actually made in the papers. This is the first time we are
9 hearing about it today. This idea of a preview that Martin
10 Shkreli can't be a co-conspirator, I think Mr. Kessler just
11 addressed that I think ably. I just wanted to point out that
12 the defendants made a cross motion on the MSMB evidence and in
13 responding to that in our motion in limine reply, which I
14 think is at page 7 or 8, the Mahaffy and Viserto cases make it
15 very clear that when there are two separate trials, an
16 acquittal in one trial cannot be presented to the jury in a
17 second trial. And we had moved in connection with what we
18 were perceiving was coming up in the cross motion, that the
19 defendant is precluded from introducing any evidence or
20 argument regarding the acquittal of Shkreli on any count, and
21 those cases make that very, very clear.

22 MR. MASTRO: Your Honor, I just cite to you United
23 States versus Universita, Second Circuit, 298 F.2d 365, quote,
24 The prosecutor has a special duty not to mislead. The
25 government should, of course, never make affirmative

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1 statements contrary to what it knows to be the truth, and I
2 respectfully suggests that it knows that Shkreli was
3 exonerated in that last trial. Thank you, Your Honor.

4 THE COURT: All right. Thank you. I'm sorry. I
5 know you need to know and I will certainly issue a decision
6 very soon on this issue. I think it is rather complicated,
7 but I think what we find ourself in is an area where there
8 isn't clear guidance because this is a pretty unique
9 situation.

10 (Continued on following page.)

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1 (Continuing)

2 THE COURT: And I expect that, my gut feeling, I
3 will tell you, frankly, is that the Government has represented
4 as officers of the Court that it has evidence that it did not
5 present at the Shkreli trial, that they are prepared to
6 present against Mr. Greebel, and that there are other
7 co-conspirators besides Mr. Shkreli and Mr. Yaffee that they
8 are prepared to present evidence on. And it does not seem to
9 me appropriate to dismiss Count 7 at this stage. I am
10 certainly open to hearing from the defense after the
11 Government rests. If the evidence is insufficient, I will not
12 hesitate to dismiss Count 7, and it will not go to the jury.

13 But I thank the parties for their advocacy, but I do
14 think that, given the procedural posture of this case versus
15 the other cases where judges have had the benefit of hearing
16 the evidence, I have nothing more than the Government's
17 representations as to what their evidence is, and they intend
18 to try this case with some of the same evidence, and evidence
19 that we have not heard before, is what I am hearing the
20 Government tell us.

21 So I do not think it would be appropriate for me to
22 make a decision at this stage to say that Count 7 is out of
23 the picture.

24 MR. MASTRO: Your Honor, I appreciate that guidance,
25 but I come back to two points that I hope Your Honor will

1 consider further.

2 Why aren't they telling you, and us, who those other
3 parties are? Because we don't have any idea who they are and
4 you've sat through a long trial and they didn't say any of the
5 names. So I'm wondering where this magic evidence is that's
6 going to come from, that wasn't good enough to put it in the
7 Shkreli trial who was the dominant party, they said was the
8 big bad guy.

9 Two -- and I think they should be directed to tell
10 you and us those names.

11 Two, Your Honor, I think when you read Rodriguez and
12 Batista again, again -- I'm sure you've read them many times
13 -- it is appropriate for there to be some form of instruction
14 to the jury about Mr. Shkreli cannot be the co-conspirator,
15 that Evan Greebel is tied to in Count 7 because of his
16 acquittal.

17 So we ask, Your Honor, to please consider that, too.

18 Thank you so much, Your Honor, for all the time. I
19 really appreciate it.

20 THE COURT: All right. Thank you.

21 MS. SMITH: And Your Honor, we would just suggest
22 that that's the jury charge they're seeking, if we could just
23 brief that in connection with the actual jury instructions.

24 THE COURT: All right.

25 MS. SMITH: I don't think that they're asking for an

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1 instruction prior to trial, since I've never heard that
2 before.

3 THE COURT: Well, they might want to say that in
4 their openings. Is that what I am --

5 MR. MASTRO: Yeah, absolutely, Your Honor.

6 MS. SMITH: Your Honor, then we need to brief this
7 issue. I have no idea why it wasn't raised with their other
8 motions.

9 THE COURT: I know. I will say that I found that
10 the defendants are bringing up motions that probably should
11 have been brought according to the deadlines that I set
12 previously. It really is not fair to the Government or the
13 Court to think of different ideas and arguments and expect
14 that, a week before the trial basically, we are going to have
15 a whole round of briefing. It is almost virtually physically
16 impossible to expect, with all the motions in limine, the
17 Daubert motions and this group of motions that are set forth,
18 to have adequate time.

19 And I do have the discretion to just say no more.
20 No more briefing. Motion time is over. It's go time for the
21 trial.

22 MR. MASTRO: Your Honor, I appreciate what
23 Your Honor is saying.

24 THE COURT: But what you are doing is you are
25 changing -- I mean, you have known and you have had the

1 advantage of seeing the entire Shkreli trial, and I know that
2 you are using a lot of the evidence and making assumptions
3 about what the evidence will be against Mr. Greebel.

4 There is -- I am not envying Mr. Greebel's position
5 at all. I am not minimizing how difficult his position is,
6 but that you did get an advantage by getting a severed trial
7 and I would expect with all the lawyers at your table that you
8 would have made timely motions, or brought up issues that you
9 knew were going to be controversial.

10 It does seem to me that when I asked for draft
11 charges, that this is something that you could have briefed
12 and brought to our attention in a timely way. And there are
13 just limits as to how long I am going to indulge all these
14 late-filed motions. I do not have to do it. I want to do it
15 because I want to make sure that the parties feel that they
16 are heard. But we are not going to try the case this way. We
17 are just not going to do it, and I am not going to be here
18 every night dealing with motions that you all think up at the
19 last minute. I do not think it is an appropriate way to try
20 the case.

21 I had a Pre-Trial order for the specific reasons of
22 getting everything decided beforehand. You had the advantage
23 of going after Mr. Shkreli and seeing all of the evidence that
24 the Government had against Mr. Shkreli; but it does not
25 necessarily mean that everything that happened in that trial

1 is determinative of what is going to be presented or argued
2 here.

3 But you certainly had enough time, given the
4 evidence that you were provided by the Government through
5 discovery, to make timely motions. And with all of you
6 sitting there, all these lawyers and given Gibson's stellar
7 reputation, I would have expected a more timely presentation
8 of some of the issues that are now, again, being raised for
9 the first time at 5:00 o'clock on a Friday a week before the
10 trial.

11 MR. MASTRO: Your Honor, I will just say this and,
12 you know, we're here fighting hard for just a client we're
13 deeply, deeply committed to.

14 Your Honor, we made a motion to dismiss. That was
15 the motion that we made. I went to the podium. Your Honor
16 expressed some reservations about my position, and in a
17 colloquy with the Court, I suggested that, well, okay, if you
18 don't think it should be dismissed, here's something that
19 minimum we should be doing.

20 We're not making a motion on this other issue, which
21 is a jury charge issue, eventually. And, in fact, the
22 Government never raised until footnote on reply that it was
23 going to have an issue with the Shkreli verdict coming in
24 here. So I just submit to Your Honor that, please don't hold
25 it against our client --

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1 THE COURT: I am not holding it against your client.

2 MR. MASTRO: -- that we chose to brief it this way,
3 but we're trying to get the count dismissed. We're not trying
4 to go for the middle ground.

5 But when Your Honor expressed the views that
6 Your Honor expressed, and I understand them and respect them,
7 we suggested that this was an alternative approach to ensure a
8 fair trial. That's what happened today. That's, I hope,
9 Your Honor understands that and will consider it.

10 THE COURT: Nothing is being held against
11 Mr. Greebel or his counsel. I am just trying to express that
12 at some point this has to stop.

13 The last trial in which a defendant was charged with
14 eight counts was hard fought and certainly with more
15 efficiency. I just am concerned about the assumptions that
16 counsel may have about how long this motion practice is going
17 to be allowed to continue, because I do have discretion to
18 reject certain motions that I think are untimely.

19 But I am prepared to go forward with other motions,
20 if you would like.

21 MS. SMITH: Your Honor, I just wanted to point out
22 that the middle ground that Mr. Mastro suggested here for the
23 first time today is prevented by black letter law. And we
24 mentioned it in our response to the --

25 THE COURT: Would you give me that cite again,

1 please.

2 MS. SMITH: It's Viserto and Mahaffey, and we
3 reference them in our motions in limine reply in response to
4 the defendant's cross-motion, which they made it for the first
5 time in their response, and to be perfectly frank, since it's
6 black letter law that it can't come in, we didn't think we had
7 to move on it once it became clear from the cross-motion that
8 that was something that they were considering. We wanted to
9 make sure we brought those cases to your attention.

10 I just wanted to point out that that sort of middle
11 ground is, you know, not appropriate and barred by law. So --
12 since it came up for the first time today.

13 With respect to the other motions, Your Honor, we're
14 happy to hear any questions that you have, but we don't have
15 anything particular.

16 MR. MASTRO: Your Honor, if I may, just for one
17 second.

18 And, Your Honor, I simply cited Rodriguez where that
19 was the procedure that was done with the jury instructions.
20 So I thought that was Second Circuit law on an instruction
21 about a co-conspirator who had been acquitted or exonerated.
22 So I think I was giving Your Honor Second Circuit law on
23 point.

24 THE COURT: Well, it is a difference, I think,
25 between an instruction which -- we will have a charging

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1 conference and the ability to make this part of your opening
2 theme.

3 MR. MASTRO: I understand.

4 THE COURT: And sort of repeat it throughout the
5 trial.

6 MR. MASTRO: I understand. We have the benefit in
7 this case of knowing that Mr. Shkreli was acquitted and
8 exonerated on Count 7. So that's something that didn't happen
9 in Rodriguez until later in the case, so.

10 Your Honor, if I may -- and I really appreciate the
11 Court's indulgence -- I don't know which issues on their
12 in limine motions Your Honor is going to want to hear argument
13 on, but I am the one who is going to be arguing, if Your Honor
14 wants to hear more argument, on the Government's motion to
15 prevent Defense from referring to our client being a father
16 and a husband, the Government moving to preclude the Defense
17 from referring to Mr. Greebel as a father, a husband and other
18 personal characteristics.

19 THE COURT: I do not have any issue with that --

20 MR. MASTRO: Okay.

21 THE COURT: -- all right, in the opening. And is
22 that the extent of what you are going to say about
23 Mr. Greebel; an attorney --

24 MR. MASTRO: Right. We would just be talking in
25 those general terms.

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1 THE COURT: In terms of your status as a former
2 prosecutor, Mr. Brodsky, Mr. Chan and Ms. Denerstein, and
3 whoever else at the table might be a former AUSA, I do not
4 think that is appropriate. I think that it is an issue that
5 is not relevant to the jury's consideration. They are to
6 decide the case based on the evidence.

7 You are here as counsel for Mr. Greebel, and I do
8 not believe that your backgrounds are relevant or should be
9 considered by the jury. The case is to be based and decided
10 on the evidence. And whatever your backgrounds may be, I
11 think, is not relevant.

12 So that is not going to be admissible.

13 MR. MASTRO: Okay. I am going to be
14 uncharacteristically silent on the point and move on to the
15 third area.

16 THE COURT: What is your other area?

17 MR. MASTRO: It's the Government's motion concerning
18 Mr. Pierotti and whether my colleague, Mr. Brodsky, should be
19 precluded from cross-examining Mr. Pierotti.

20 THE COURT: Do you want to argue that, Mr. Brodsky,
21 since you know best?

22 MR. BRODSKY: I feel like I should recuse myself.

23 THE COURT: All right. Fine.

24 I think that Mr. Brodsky should be allowed to
25 cross-examine Mr. Pierotti, but what he needs to be very

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1 careful of is using his former encounters or knowledge of
2 Mr. Pierotti, and in the process, making himself a witness.
3 Because you will be disqualified if you do that, all right?
4 So be careful.

5 MR. MASTRO: Much appreciated, Your Honor. I know
6 when to sit down and shut up. So thank you.

7 THE COURT: Okay. I think Mr. Brodsky knows where
8 the line is.

9 MR. BRODSKY: Yes, Your Honor.

10 MR. MASTRO: He most definitely does.

11 MS. SMITH: Your Honor, I just want to say that if
12 it's an honest answer then of Mr. Pierotti -- I am just
13 concerned. I find it very concerning that with this number of
14 attorneys, there is no one else who can cross-examine
15 Mr. Pierotti. I think it's being done to potentially be
16 intimidating.

17 And I also am concerned that --

18 THE COURT: Wait, I do not understand.

19 MS. SMITH: The cross-examination of Mr. Pierotti by
20 Mr. Brodsky.

21 THE COURT: Yes.

22 MS. SMITH: See, if they intend to go into the
23 Galleon, which I believe they do intend to go into --

24 THE COURT: Well, because it is as part of his
25 direct testimony.

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1 MS. SMITH: I completely agree. I think it's
2 appropriate.

3 THE COURT: Right.

4 MS. SMITH: It was brought out on direct because
5 defense counsel in the Shkreli trial said that they were going
6 to cross-examine.

7 THE COURT: Right.

8 MS. SMITH: If Mr. Brodsky is not going to
9 cross-examine on that point, then I don't need to talk about
10 it on direct.

11 THE COURT: Well, what is it going to be,
12 Mr. Brodsky?

13 MR. BRODSKY: I'm sorry. I didn't hear the last
14 question.

15 THE COURT: She brought it out on direct in the
16 Shkreli case because Mr. -- his defense team indicated they
17 wanted to cross-examine him about his involvement in the
18 Galleon case.

19 MR. BRODSKY: Yes. We've informed the Government
20 that we had the same plan and we actually requested from the
21 Government on a few occasions to provide us with the FBI
22 reports of Mr. Pierotti's interviews with the FBI. So before
23 Mr. Pierotti signed a non-prosecution agreement with the
24 Government, Mr. Pierotti must have interviewed with the
25 Government, there must be FBI reports.

1 Now, they said they asked the Southern District of
2 New York to produce the reports, but they couldn't find them.
3 We were going to appeal to Your Honor that we know, not that
4 we're going to tell the jury, but from being former Federal
5 prosecutors, we know the FBI has a database, electronically,
6 where the FBI reports exist and they're there. And even
7 though they may not be signed, initialed as the original, the
8 FBI can print those FBI reports and provide them.

9 So that was what we were going to request. But to
10 answer your direct question, would we cross-examine
11 Mr. Pierotti about his participation in trading on inside
12 information as it was elicited on the direct? The answer is
13 yes.

14 MS. SMITH: And his non-prosecution agreement. Is
15 he going to be asked about the non-prosecution agreement.

16 MR. MASTRO: He has one.

17 MS. SMITH: I know. So I'm asking, because that is
18 the concern, because having spoken to Mr. Pierotti, he feels
19 that Mr. Brodsky is one of the people who said that he needed
20 one. And so if there is an argument made in cross-examination
21 about, did you really need one? Did you have exposure? That
22 is the concern which we laid out in our brief.

23 And I want to flag it because Mr. Brodsky is now
24 potentially inviting this, and we will be instructing
25 Mr. Pierotti, and we can do it ahead of time; but a truthful

1 answer may, in fact, require, depending on how it's phrased,
2 require identification of Mr. Brodsky as one of the
3 prosecutors.

4 So I just want -- that was always the concern, and I
5 hope that we can make that very clear. And also, you know, we
6 will, obviously, be watching it closely for objections.

7 But, you know, the -- we felt, and what we briefed
8 was the appearance of impropriety. There was a D.C. circuit
9 case where it's very common for people to kind of go in
10 Government and out Government. The idea that a former Federal
11 prosecutor would be cross-examining someone who was brought in
12 as a witness and given an NPA, we think that appearance of
13 impropriety is highly problematic. If the Court wants to go
14 forward, you know, we just want to make sure that we're very
15 careful about that issue with the witness.

16 THE COURT: Well, I believe that Mr. Brodsky knows
17 the risks that he runs if he elicits testimony that would make
18 him a fact witness. And if Mr. Pierotti is asked questions
19 where he discloses actions or words of Mr. Brodsky, I think
20 that there are strong grounds for disqualification at that
21 point.

22 So he needs to be careful, and I think he is
23 skillful enough to know what not to do, and how to avoid it.
24 And I am sure the Government can also help Mr. Pierotti
25 understand that he has to be truthful in his answers. But if

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1 he can avoid identifying or outing Mr. Brodsky as the
2 prosecutor in the case, that he should do so.

3 But if he is pressed and it comes out because he
4 feels that it is an appropriate answer to a question, then we
5 have to take appropriate action.

6 MR. MASTRO: Your Honor, just to clarify one thing.
7 I think the easiest way to avoid all of this is for that which
8 must exist, non-pros agreement and FBI 302s, that are on a
9 database, even if the U.S. Attorney's Office hasn't been able
10 to locate them yet, that they should be directed to find them.

11 THE COURT: Did you produce them as part of his 3500
12 material and Giglio?

13 MS. SMITH: Your Honor, the first thing is the
14 non-prosecution agreement. As we disclosed in the first
15 trial, I believe you remember, Mr. Pierotti was given a
16 non-prosecution agreement. He doesn't have it in his records.
17 We did ask -- because that is a document that he would
18 normally have in his own records, we did ask the Southern
19 District to look for it. They were unable to find a signed
20 copy.

21 THE COURT: Does his attorney have a copy?

22 MS. SMITH: His attorney does not. This all was in
23 the letter that was disclosed in connection with the first
24 trial, and was given to the defense prior to filing motions
25 in limine in this case. So, you know, this has been an issue

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1 for a while.

2 The FBI 302s, we've never said we can't find them.
3 They are not in the possession, custody or control of this
4 progress team. They are not Mr. Pierotti's 3500 in this case.
5 It's a completely unrelated case.

6 The issue here is a Giglio issue. We provided the
7 Giglio information that Mr. Pierotti had been given a
8 non-prosecution agreement in connection with that one
9 Smucker's trade in the Galleon case. There is no further
10 disclosure that's required.

11 Part of the problem here is that Mr. Brodsky was a
12 prosecutor on that case, and may have information that we
13 don't have from his interactions with Mr. Pierotti. The 302s
14 that were created in connection with that case are completely
15 tangential. They are not 3500 in this case, and we are not
16 required to go and get them and give them to Mr. Brodsky; not
17 to mention Mr. Brodsky has the information that's in those,
18 because he was one of the prosecutors that met with
19 Mr. Pierotti for the case.

20 So, we have never said that we couldn't locate the
21 302s. We said we couldn't locate the NPA, which they've known
22 since August and, in fact, they've known since July, since
23 that was part of the cross-examination. And the 302s are not
24 appropriate. They're not 3500 in this case.

25 MR. MASTRO: Your Honor, just very briefly.

1 First, they say they don't have a signed non-pros
2 agreement. We'll take whatever copy they have, because we
3 know -- we know if Counsel, in other cases where Mr. Pierotti
4 was potentially a witness, have those documents, but they're
5 under some form of Court Protective Order. So it exists.

6 Number two, this is classic Giglio material. It
7 goes very much to his veracity, honesty. The kind of thing
8 you have to give on a witness to the defense, so the defense,
9 you know, would have that ability. This isn't some unrelated,
10 earlier case, benign witness. This is somebody who had a
11 non-pros because he was, apparently, involved in activities
12 that reflect on his credibility and veracity. So that's
13 classic Giglio.

14 THE COURT: So where should they -- if I were to
15 order them --

16 MR. MASTRO: They're right there at the end of
17 table.

18 THE COURT: The non-prosecution agreement. Are you
19 saying the FBI has it?

20 MR. MASTRO: I'm saying they have only said they
21 don't have the signed version. Even the unsigned version
22 would be helpful to us, because we show it to the witness and
23 say, is this your non-pros agreement? Number one.

24 Number two, on the Giglio, those guys, at the end of
25 table, the FBI agents, they can go into their database right

1 now and get that. That is classic Giglio.

2 When the Government has documents that reflect on
3 the veracity and honesty of a witness, and involves
4 potentially the witness being involved in fraud, of course the
5 Government has to produce that.

6 So, Your Honor, I think that what should be
7 happening here, and it will resolve all these other issues the
8 Government is talking about, is Mr. Brodsky actually doesn't
9 have any particular recollections of Mr. Pierotti and what he
10 said or didn't say. He had only the most passing acquaintance
11 with Mr. Pierotti.

12 But we know from the first trial there's a non-pros.
13 We know they have very carefully said they don't have the
14 signed version. And we know there were 302s from that earlier
15 case. They are classic Giglio. So they should have to be
16 produced.

17 Now I've heard for the first time -- I actually
18 heard before, what we heard before was they were having
19 trouble locating it. Now we hear for the first time, it's not
20 a question of locating it. It's a question of they're taking
21 the position they don't have to produce it. Classic Giglio.
22 Has to be produced.

23 Please, gentlemen at the end of table, produce it.

24 MS. SMITH: Your Honor, to be very clear.

25 (Continued on following page.)

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1 (Continuing)

2 MS. SMITH: Your Honor, to be very clear, we have
3 neither a signed or non-signed copy of the MPA. I have never
4 had a conversation with Mr. Mastro about the 302s, but I did
5 not represent that we could not find the 302s. In fact, we
6 had a very frank conversation on August 15, 2017, where I said
7 we didn't think we were required to produce them. They didn't
8 move in limine to get them. The Giglio material has been
9 disclosed. Giglio means what's the information. They don't
10 need the 302s. They have the information. They, in fact,
11 have his testimony from the first trial.

12 So, again, we got an e-mail about this this week,
13 when it is something that could have been raised in the
14 motions in limine. They have the information. It's not that
15 we have the signed MPA and won't give it to them. Nobody
16 seems to have a copy of it. It is five or six years ago at
17 this point. That is the position on the ground. I just want
18 to make sure that is all very clear for the record.

19 THE COURT: So does the lawyer for Mr. Pierotti have
20 it?

21 MS. SMITH: We asked. He cannot find a copy.

22 MR. BRODSKY: Your Honor, if I may, just for a
23 moment.

24 THE COURT: Yes.

25 MR. BRODSKY: I remember meeting Mr. Pierotti once

1 but not the second time, which is apparently when he signed
2 the non-pros. But, respectfully, Your Honor, I did listen to
3 his testimony when he testified here during the Shkreli trial.
4 I was in the audience. He testified, in sum and substance,
5 that he knew the information was coming ultimately from Rajat
6 Gupta, a member of the board of directors of Proctor & Gamble.
7 He knew it was non-public. He knew it related to a merger.
8 But he said, according to his testimony, it was not material
9 and he didn't commit a crime. That was what he said.

10 Respectfully, Your Honor, knowing I was in the
11 Southern District of New York, I find it hard to believe that
12 a federal prosecutor would sign a person like that up knowing
13 the information was ultimately coming from a member of the
14 board of directors to a non-pros. What I suggest, Your Honor,
15 is it goes ultimately to Mr. Pierotti's credibility. He took
16 the witness stand and he testified to that. The federal
17 prosecutors have a duty and obligation before they put any
18 witness on the stand to test their credibility.

19 In their possession, in the FBI's possession are Mr.
20 Pierotti's statements about his prior acts before he received
21 the non-pros. For the life of me, I don't understand why they
22 don't obtain it for their own reasons. But certainly, without
23 question, a defense has a right, when it is going to come out
24 on direct and you know it is going to come out because it
25 reflects his credibility about what he did in the past, if the

1 FBI reports in the possession of this Government sitting at
2 this table are inconsistent with what Mr. Pierotti testifies
3 to about that, that is classic credibility cross-examination.
4 How in the world could we not want to obtain that and have the
5 right to obtain that?

6 If this means, Your Honor, I can't do the
7 cross-examination, let's get the 302s. It is worth it to us.
8 We want to have access to the FBI reports reflecting the
9 statements of Mr. Pierotti because Mr. Pierotti's credibility
10 is at issue. He is the single and only witness on Count
11 Eight. He is the only witness the Government called.

12 If you remember, Your Honor asked what's the other
13 evidence on Count Eight and they told you it was going to be
14 Timothy Pierotti and some e-mails through Special Agent
15 Braconi. Given the significance of his testimony, the only
16 witness, and given that he participated in criminal activity
17 for which he received the non-pros, how in the world can we
18 sit here and know that these 302s with his statements are in
19 their possession. They are accessible to them but they won't
20 produce them. I have never heard of such a thing.

21 MS. SMITH: Your Honor, this is part of the problem,
22 I think, with the appearance of impropriety, Mr. Brodsky using
23 information he knows about the case to think about how he is
24 going to cross examines Mr. Pierotti, who he brought in as a
25 witness for the case and who he gave the non-prosecution

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1 agreement to.

2 THE COURT: I think he just said, though, he was
3 willing not to cross-examine if he could get the 302s.

4 Did you say that?

5 MR. BRODSKY: Your Honor, I did say that. And
6 having prosecuted the Rajat Gupta case, I know from
7 prosecuting that case Timothy Pierotti was never called as a
8 witness. I don't remember Timothy Pierotti in connection with
9 that case. Honestly, Your Honor, I don't. Swear me in and I
10 will say that.

11 THE COURT: Do you have a doubt as to whether he has
12 a non-pros?

13 MR. BRODSKY: No, I don't have a doubt that he has
14 non-pros. But when Gary Naftalis opened in the trial of Rajat
15 Gupta, he referred to the fact that there was going to be a
16 witness who has traded in Smucker's based on a non-pros. So
17 having read the opening and knowing that's the reference to
18 Timothy Pierotti, we believe that Timothy Pierotti has
19 non-pros.

20 We believe there is an electronic copy at the
21 Southern District of New York. There's an unsigned copy. Not
22 only that, Your Honor, but the practice of the Southern
23 District of New York in every trial, and this was no
24 different, was to keep -- and I'm sure this prosecution team
25 at its very best does the same thing -- was to keep electronic

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1 copies of all the 3500 material. So, undoubtedly, there is an
2 electronic copy at the Southern District of New York. But at
3 a minimum, Your Honor, sitting in the possession of this
4 prosecution team, which includes the FBI, they have the 302s,
5 but they are blindly, consciously avoiding getting them. They
6 don't want to see what's there. And how can we allow that
7 with the singular sole witness and his credibility on Count
8 Eight?

9 MS. SMITH: Just respectfully, Your Honor, we did
10 check with the Southern District. Whatever file system Mr.
11 Brodsky and his colleagues were using for that trial does not
12 have a copy of the non-prosecution agreement. We have tried
13 to find it. I don't have an answer for that.

14 THE COURT: Mr. Naftalis doesn't have it?

15 MR. MASTRO: Mr. Naftalis, who I spoke to in his
16 office, they are under a protective order in that case. If
17 Your Honor were to direct something, that might be a different
18 issue.

19 My point is this, Your Honor, apparently they can go
20 to the FBI's files. The FBI has the 302s. I'm hearing
21 something a little different. I heard that we were supposedly
22 told they wouldn't produce them but then we were told they
23 tried to get them and couldn't get them.

24 MS. SMITH: Because Mr. Mastro was not on the call.

25 MR. MASTRO: Your Honor --

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1 MS. SMITH: Excuse me, I would like to make the
2 record clear --

3 MR. MASTRO: I was in the middle of speaking.

4 THE COURT: Let's just let him speak. He was
5 speaking first.

6 MR. MASTRO: All I want to say, Your Honor, was that
7 apparently it didn't go to the FBI, which keeps all of its
8 302s electronically. And, by the way, wouldn't that be the
9 easiest way to clear up entirely this issue of what Mr.
10 Brodsky knows or doesn't know and he has no recollection of
11 dealings with Mr. Pierotti, having met him once. It's in the
12 302s and that's what he would be cross-examined on they were
13 to be produced. The FBI definitely has them, Your Honor.

14 THE COURT: It seems to me that if he is going to
15 testify on a specific subject, that the Southern District
16 prosecution in the non-pros, it seems to me that his 302s, his
17 prior statement about that should be disclosed. I understand
18 that this is not about that case, but it certainly is in this
19 case. He is going to testify about it and it is being
20 elicited on direct. Generally, when a witness testifies,
21 their prior statements are disclosed. I understand the
22 distinction that you are making, but he is talking about the
23 Southern District non-pros.

24 MS. SMITH: Well, he's talking about it because the
25 defense is going to cross him on it.

1 THE COURT: Right. It seems to me they should have
2 the 302s because in order for them to meaningfully
3 cross-examine him and determine whether he is telling the
4 truth about what happened in the Southern District, whatever
5 that may be, they have the right to see what he told the FBI,
6 if he is saying something different here before the jury than
7 he did in the Southern District.

8 MS. SMITH: So it's our understanding that Mr.
9 Brodsky is not going to cross Mr. Pierotti. I will have to
10 try to get those 302s. I can't represent that I can, but we
11 certainly will ask the FBI if they have them.

12 THE COURT: Well, he did say that and he did confirm
13 that when I asked him.

14 MR. MASTRO: But, Your Honor, and I said for Mr.
15 Brodsky, if the 302s are produced, how can there possibly be
16 any issue about him doing the cross-examination based on the
17 302s, which are FBI reports, not something he would have known
18 separately? Actually, the 302s are the cleansing process here
19 to make sure there isn't any percipient witness issue.

20 And Mr. Brodsky, by the way, says I will not cross
21 that line and says also that he doesn't recall any particular
22 interactions other than meeting the guy once. But the 302s
23 are the record of the FBI of what the guy said. That takes
24 Mr. Brodsky's past experience out of the equation, but it's
25 classic Giglio going to veracity and honesty. So I think the

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1 notion that they should have to produce the 302s exist
2 regardless of who does the cross-examination. And that Mr.
3 Brodsky or I, whichever one we decide to have, but Mr. Brodsky
4 should have the right to do that cross-examination off the
5 302s, which have nothing to do with a percipient witness.

6 MS. SMITH: Your Honor, if Your Honor orders us to
7 produce the 302s, we will go get them. If the 302s reflect
8 that Mr. Brodsky was at meetings with Mr. Pierotti, we do have
9 the percipient witness. Then they are going to be
10 cross-examining him with a document that says Mr. Brodsky was
11 present.

12 And, first of all, that is a whole other separate
13 issue that we can deal with down the lines in terms of
14 extrinsic evidence on impeachment material. So I have heard
15 one thing and I heard them backing off. It's all over the
16 place.

17 THE COURT: I understand.

18 MS. SMITH: If Your Honor orders us to get the 302s,
19 we will. I don't want to belabor this any further.

20 THE COURT: All right. Get the 302s. I don't know
21 what they are going to show and I don't know what Mr. Brodsky
22 is going to do with them. He is on fair notice of the
23 consequences if he crosses the line.

24 MR. MASTRO: Thank you, Your Honor.

25 MR. BRODSKY: And I know the time is running late

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1 and we had a lot of motions pending.

2 THE COURT: Yes, you do. Don't you want to know my
3 rulings?

4 MR. BRODSKY: Yes.

5 THE COURT: What did you want to say?

6 MR. MASTRO: If I may please be excused, Your Honor,
7 I'd really appreciate it.

8 THE COURT: Yes, of course. Have a nice weekend.

9 MR. MASTRO: And I look forward to seeing you next
10 time.

11 THE COURT: Did you want to make an argument? I
12 don't want to cut you off if you have something more to add.
13 I have read your papers.

14 MR. BRODSKY: Well, with respect to the remaining
15 motions in limine, I was going to highlight the ones that
16 were, from our perspective, extremely -- you know, we have a
17 long list of priorities, the most important of the most
18 important, and I didn't want to minimize some others, but
19 that's what I was hoping to do. But I know it is running
20 late.

21 THE COURT: The last trial group was able to come to
22 a lot of understandings. For some reason, this group is not.
23 All that happens is more motions. I would be happy if you
24 want to focus on certain materials or certain aspects of your
25 motion.

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1 MR. BRODSKY: Yes, Your Honor.

2 THE COURT: This is from the big binder?

3 MR. BRODSKY: It is from the large chart, yes. If I
4 had to highlight a few, and, Your Honor, respectfully --

5 THE COURT: I will try to make rulings.

6 MR. BRODSKY: -- we would love to come to agreement
7 with the Government on issues, but some of these are legal
8 issues where we feel we have the absolute right to introduce
9 the evidence and the Government says no. Some of them are
10 where the Government says we have no right to introduce
11 evidence and we say we do, so we are at loggerheads on those
12 issues. The first one I would point out, Your Honor,
13 respectfully is with respect to the arbitration.

14 THE COURT: Yes, that is B-1 and C-1.

15 MR. BRODSKY: Correct.

16 THE COURT: Cross motions.

17 MR. BRODSKY: And the reason why I highlight this,
18 Your Honor, and I emphasize it is because I do believe we have
19 instruction from three different courts: One in the Second
20 Circuit, one in the Fifth Circuit, and one in the Ninth
21 Circuit, where two of them are criminal cases, and those
22 convictions were vacated, United States versus Fisher in the
23 Fifth Circuit and the United States versus Boulware in the
24 Ninth Circuit. And those convictions were vacated for one
25 reason and one reason only and that is because the exact same

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1 evidence we are seeking to introduce was not introduced for
2 the exact same reasons that this Government offers that the
3 Government offered in those cases.

4 (Continued on following page.)
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1 (Continuing)

2 THE COURT: All right. So let's talk about
3 Mr. Rosenfeld, shall we?

4 MR. BRODSKY: Yes, Your Honor.

5 THE COURT: I think that the arbitrator in that
6 decision, you know, made specific statements about what she
7 was not deciding.

8 MR. BRODSKY: Correct.

9 THE COURT: And I am not really sure because there
10 seems to be inconsistency within your submissions as to
11 whether you want to admit the entire decision or just portions
12 of it. It is a little difficult to for me to decide what is
13 at issue when I do not think the dispute has been clearly
14 framed.

15 MR. BRODSKY: Understood, Your Honor.

16 THE COURT: So what is it that you want to do?
17 Because you have said inconsistent things. You have said
18 parts of it, then you said all of it.

19 MR. BRODSKY: Right. What we wanted to do
20 initially, Your Honor, is state what the law was, which is
21 that when legal rights and responsibilities -- what I think
22 the law requires, and then we can talk about the scope of
23 it -- what I think the law requires, based on United States
24 versus Dupree and Boulware in the Ninth Circuit, what I think
25 those cases say -- and the Government cites it for other

1 propositions, United States versus DiMaria -- what those cases
2 say is that legally operative conduct, verbal operative
3 conduct or rulings, for example, by State Court proceedings,
4 arbitrations that define the legal rights and responsibilities
5 of the party, those are admissible as nonhearsay; and
6 respectfully, under 803 subsection -- forgive me if I forget
7 the subsection here, I believe it's Subsection 15, and that's
8 relying on the United States versus, I believe, Boulware
9 decision, that exception actually applies. 803(15).

10 And so what I would suggest at a minimum,
11 Your Honor, what would be admissible, is the fact that there
12 was an arbitration; the fact that Dr. Rosenfeld filed the
13 arbitration against Retrophin to enforce the consulting
14 agreement that he had; that he won his -- that Retrophin
15 argued that the consulting agreement was a sham; the
16 arbitrator ruled in favor of Dr. Rosenfeld, finding that it
17 was not a sham, and finding that Retrophin owed the remaining
18 amount of money on the consulting agreement. And I think
19 there are certain portions that directly make this statement
20 and, at a minimum, those portions that find that the
21 consulting agreement is an enforceable agreement that was
22 breached by Retrophin; that the demands on Rosenfeld -- this
23 is on the bottom of page 6, for example, if I had to point out
24 the specific areas that I think would absolutely be required
25 to be admissible, on page 6.

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1 THE COURT: Well, do you want to just highlight --

2 MR. BRODSKY: I can highlight them for you and
3 submit them to the Court.

4 THE COURT: Because this is the thing.

5 MR. BRODSKY: Yes, Your Honor.

6 THE COURT: I think Rosenfeld's agreement is
7 certainly noted in the indictment, and I think the arbitrator
8 was very clear in saying I am looking at whether this is an
9 enforceable agreement as a matter of contract. I am not
10 making any findings about whether there was illegality or
11 fraud.

12 What I am looking at is the terms of this agreement,
13 and I think that this decision can come in, but it has to be a
14 balanced admission. So as much as the rights and -- the
15 rights of the parties would be admissible in terms of what you
16 have just articulated, that there was an arbitration, that
17 Dr. Rosenfeld wanted to enforce the agreements that the
18 arbitrator found that he had given minimal services in
19 exchange for the consideration that he received, and it is
20 rejecting the sham argument of Retrophin, and ruling that
21 Retrophin owed him money, I think that the qualifications that
22 she made also would have to, in fairness, be admissible as to
23 what she did not find.

24 MR. BRODSKY: Certainly.

25 THE COURT: And that she had other information that

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1 -- other than that which might be presented here.

2 MR. BRODSKY: Certainly. I think we can include the
3 fact that she held the hearing on a number of days, and
4 listened to X number of witnesses, and include that. We have
5 no issue with that, Your Honor, and it certainly should be
6 balanced. We are perfectly fine with it being balanced.

7 THE COURT: All right.

8 So, why don't I make a ruling on that and I will
9 look at what the parties have said. I think the Government is
10 standing and wants to go be heard on this --

11 MR. BRODSKY: Yes, Your Honor.

12 THE COURT: -- in order to give the balance and then
13 we will move on to Mr. Koestler.

14 MR. KESSLER: Sure, Your Honor. I'll be very brief.

15 THE COURT: Yes.

16 MR. KESSLER: First, I think to the extent a hearsay
17 exception applies, what the case is that Mr. Brodsky cited,
18 establishes that the operative part of the award should come
19 in. So in the Rosenfeld arbitration, it would be that there's
20 a -- there was an arbitration for breach of contract claim for
21 the consulting agreement, and damages were awarded to one
22 party or another.

23 Finding, such as, there were minimal consulting
24 services are factual findings that the arbitrator made that,
25 you know, could well be the province of the jury instead, and

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1 that's where intra-trial litigation could arise.

2 I will also just note so that the Court and the
3 defense are on notice. We do not intend to introduce evidence
4 related to the Rosenfeld consulting agreement. So to the
5 extent the Court allows some portion that this agreement to
6 come in, it would be on the defense case.

7 THE COURT: All right.

8 And with regard to Mr. Koestler, I do not think that
9 his agreement is at issue or noted or part of the indictment.

10 MR. KESSLER: It is not.

11 THE COURT: And the Government is not alleging that
12 this is fraudulent.

13 Do you still want this in?

14 MR. BRODSKY: Your Honor, what I would suggest is
15 that we revisit that in connection with our case in chief and
16 if -- we reserve the right to come back to, Your Honor, if we
17 plan to introduce it.

18 The reason why I'm saying that, Your Honor, is we
19 don't know what the Government's case-in-chief is. We have
20 the general picture. They say it's a new trial. They say
21 they have new evidence. And so we want to reserve the
22 ability, that if they make some arguments about Evan Greebel
23 and what he knew or didn't know, and Koestler becomes relevant
24 to that, we would like the ability to use that evidence.

25 Sitting here today, I would tell you, based on if

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1 they retried the Shkreli case, we wouldn't introduce evidence
2 relating to Mr. Koestler. But without knowing their case,
3 it's hard to just stipulate that we're not going to introduce
4 it.

5 THE COURT: No, I understand. But I think they are
6 representing that they are not going to be discussing the
7 Koestler agreement.

8 Am I right?

9 MR. KESSLER: Yes. Well, I don't think we should
10 make that representation.

11 THE COURT: Okay.

12 MR. KESSLER: For Rosenfeld, we agree.

13 THE COURT: All right.

14 MR. KESSLER: That we are not going to --

15 THE COURT: It is not coming in, in your
16 case-in-chief.

17 MR. KESSLER: No.

18 MR. BRODSKY: Well, Your Honor, if they are now
19 suggesting that they are bringing in Mr. Koestler, then I do
20 think it -- because it affects the opening -- I do think we
21 should discuss what they're going to bring in, and then we can
22 argue about the relevance of Mr. Koestler's arbitration.

23 MR. KESSLER: We're not arguing that the Koestler
24 arbitration -- the Koestler settlement consulting agreement is
25 one of the charged consulting agreements that fits in the

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1 bucket. There may be evidence related to Koestler that comes
2 in for other reasons.

3 THE COURT: About other --

4 MR. KESSLER: Other arrangements with Mr. Shkreli
5 and Mr. Greebel. And what generally was discussed.

6 THE COURT: But not that agreement.

7 MR. KESSLER: That's correct.

8 MR. BRODSKY: Well, what happened in the
9 arbitration, as Your Honor knows, is that Mr. Koestler had a
10 consulting arrangement and also had a direct stock transfer
11 agreement with Mr. Shkreli. The Court made certain findings
12 as a result of that in a heated litigation between
13 Mr. Koestler and Retrophin.

14 And what I'm hearing now suggests that it is
15 relevant. Relevancy, of course, being the lowest threshold
16 available where there is any tendency to make a fact of
17 consequence more or less likely. So if I'm hearing that
18 they're going to bring in evidence relating to Mr. Koestler, I
19 do believe that we should discuss the admissibility of the
20 arbitration so that we have the ability to open on it.

21 MR. KESSLER: Well, so I'm not representing that our
22 opening will include the Koestler arbitration. I'm just
23 saying we don't want to take the position today that there
24 will be no evidence related to Mr. Koestler at any point in
25 the Government's case.

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1 THE COURT: But you have represented there will not
2 be evidence regarding the agreement.

3 MR. KESSLER: For Rosenfeld. And the Koestler
4 Consulting.

5 THE COURT: And Koestler's agreement.

6 MR. KESSLER: There will be no allegation that the
7 consulting agreement was one of the same sham consulting
8 agreements that are discussed in the indictment.

9 THE COURT: All right.

10 MR. KESSLER: Just also to be clear, if the
11 Rosenfeld arbitration comes in on the defense case, I don't
12 understand the Court to be saying we would not be allowed to
13 cross-examine whichever witness put the agreement in about the
14 facts and circumstances of everything that happened in that
15 arbitration, or to offer rebuttal evidence to address problems
16 with that arbitration. That would all be permissible.

17 THE COURT: Right. You would not be precluded from
18 cross-examination of the witness.

19 MR. KESSLER: And offering evidence on a rebuttal
20 case.

21 THE COURT: Yes.

22 MR. KESSLER: To the extent we needed to do that.

23 THE COURT: Yes. You would be allowed to do that.
24 I understand that.

25 MR. KESSLER: Okay, thank you.

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1 THE COURT: All right.

2 Should we move on? What else do you feel passionate
3 about, Mr. Brodsky?

4 MR. BRODSKY: Thank you, Your Honor.

5 THE COURT: It seems everything, but that is all
6 right.

7 MR. BRODSKY: I do. I do.

8 THE COURT: All right.

9 MR. BRODSKY: The next one I would go to,
10 Your Honor, are F-1, if I had to select. And the reason why I
11 go to it, Your Honor, is there's two parts to it.

12 MR. PITLUCK: Sorry to interrupt, we're not
13 following. We're kind of organized our own way, so if you
14 could just tell us which motion.

15 MR. BRODSKY: Absolutely.

16 THE COURT: Can I just make a ruling on the motion
17 that Mr. Greebel made to admit statements by Mr. Shkreli.

18 I do not believe that this motion should be granted.
19 I do not believe that if it is the description of a present
20 sense impression, Mr. Shkreli's statements are not describing
21 the events as they occurred. He is testifying or speaking
22 about events in the past. So I do not think that rule
23 provides a route for admissibility.

24 I also do not find that his statements will be
25 admissible as admissions against his interest. He is not

1 making inculpatory statements that would impair his own penal
2 interests in his series of statements.

3 And finally, I do not find these to be given -- the
4 statements to have been given in a situation where one can say
5 that these are trustworthy statements.

6 MR. BRODSKY: Understood, Your Honor.

7 If I had to emphasize one among them, and obviously,
8 if something -- the Government opens the door to Mr. Shkreli's
9 credibility and we feel that under one of the rules of
10 evidence we want to attack Mr. Shkreli's credibility in a
11 certain way, I just want -- for example, under Rule 806, I
12 believe that if the Government tries to introduce evidence
13 relating to -- and we briefed, this, Your Honor, in our brief.
14 But if there is -- or -- and Rule 608. If the Government is
15 going to try to introduce evidence relating to Mr. Shkreli or
16 statements of Mr. Shkreli, and we have evidence based on
17 Mr. Shkreli's statements that undermine that credibility, I
18 think the Government opens the door to that. I would just
19 note that.

20 Your Honor, if I had to identify one statement that
21 I would ask you to revisit briefly, it is Mr. Shkreli's
22 statement after his arrest that it was bizarre that Evan
23 Greebel was arrested.

24 The reason why I say it, and I cite the
25 United States V DiMaria case, 727 F.2d 265 Second Circuit

1 1984. In that case, the Second Circuit vacated the
2 defendant's conviction for conspiracy and substantive counts
3 relating to contraband cigarettes. And for the sole reason
4 that the defense was not allowed to introduce a single
5 statement of the defendant when he was arrested, and the
6 statement of the defendant when he was arrested was, I thought
7 you guys were investigating white collar crime. What are you
8 doing here? I only came here to get some cigarettes real
9 cheap.

10 The Second Circuit said, the Government argued that
11 was a false statement. Totally false. It was wrong. It was
12 contradictory to other evidence. And the Second Circuit said,
13 false as it may be, whatever it may be, it squarely fits
14 Rule 803(3).

15 It was a present state of mind of the defendant, at
16 the time the defendant was making the statement. And it
17 didn't go to whether or not the jury could find the state of
18 mind -- that this particular state of mind was this individual
19 thought that bootlegging cigarettes was what he was doing not
20 stealing cigarettes -- not buying stolen cigarettes, but cheap
21 cigarettes.

22 So it's our respective view that based on that case,
23 Mr. Shkreli's statement at the time of his arrest, that it's
24 bizarre that Evan Greebel was arrested, which is a -- it's a
25 state of mind of Mr. Greebel at that time comes in under

1 DiMaria. That's all I would note and I would ask, Your Honor,
2 to look at that case.

3 And I will quote from DiMaria where it says, quote,
4 False it may well have been, but it fell within Rule 803(3) as
5 it clearly did if the words that rule are read to mean what
6 they say. Its truth or falsity was for the jury to determine.

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8 (Continued on following page.)

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1 (Continuing)

2 MR. BRODSKY: I think the statement is so compelling
3 by Mr. Shkreli, what he said upon his arrest, learning about
4 Evan Greebel, not having received the charging instrument, not
5 having received the indictment. That's his statement. I
6 think that is so compelling that we should be permitted to
7 reflect that state of mind of Mr. Shkreli. This case is going
8 to be a lot about the relationship between Mr. Shkreli and Mr.
9 Greebel. The Government has one view of it. We have a
10 completely different and opposite view of it. I think this
11 state of mind evidence should come, but I'm happy to turn --

12 MR. KESSLER: We understand the Court to have ruled
13 on this, but if there are other things that would be helpful
14 for the Court to hear at this point, I'm happy to address
15 them.

16 THE COURT: Well, I am happy to hear from you on
17 this particular point because this is important statement to
18 the defense.

19 MR. KESSLER: Sure. The statement in context comes
20 in the middle of a long post-arrest interview which we
21 attached as Exhibit A to our reply brief. It comes after the
22 defendant jokes with the FBI. He talks about stock prices.
23 He talks about talking with his lawyer before the FBI talked
24 with him and then he goes on to give this long, rambling
25 answers, I talked with Asler. That is his lawyer. That was

1 his original lawyer. He goes on to talk about handicapping
2 his chances of being acquitted. He talks about how if he had
3 just been charged with conduct with MSMB he would understand
4 how the Government could have made that mistake, but the Evan
5 thing, meaning the charges with Retrophin are just bizarre.
6 This is not someone who was surprised on a street corner with
7 agents with a bunch of cigarettes and blurted something out.
8 This is a calculated, long discussion in the middle of a long,
9 calm post-arrest interview. The circumstances are not the
10 same.

11 THE COURT: Is this one videotaped?

12 MR. KESSLER: Yes, and we're also happy to provide
13 the video to the Court.

14 THE COURT: I have looked at it.

15 MR. KESSLER: The one other thing I would say, Your
16 Honor, is 803(3) does not allow -- it is quoted in DeMaria --
17 the offering of a statement of belief, such as the Evan thing
18 is bizarre -- that is the little snippet that we have been
19 discussing -- to prove the fact believed, but that's what they
20 are doing. The relevance is not what Mr. Shkreli himself
21 thought. The relevance is whether it was odd, whether that
22 can be used in some way to argue it was odd. So it is just a
23 circular effort to get around the 803(3) prohibition, which
24 doesn't apply any because this isn't some surprised defendant
25 describing his state of mind. He is giving a calculated -- I

1 mean, the statement ends with "I'm going to throw a big parade
2 and party when I win; you're invited." This is not some off
3 of the cuff kind of statement.

4 MR. BRODSKY: DeMaria, you will note upon reviewing
5 the case, was not an excited utterance case. It was not, as
6 Mr. Kessler is suggesting, a decision made about somebody
7 making the statement off the cuff. It was a case about
8 strictly 803(3) state of mind. And the relevance is clear,
9 regardless of whether it was calculated, because in DeMaria,
10 the Government said it was false, and regardless of whether it
11 was exculpatory or inculpatory, because in DeMaria, the
12 Government argued it is totally inculpatory. The reality is,
13 under DeMaria, the state of mind of this particular person
14 saying it's bizarre Evan was arrested is relevant. In this
15 case, it makes a fact of consequence more likely that these
16 two individuals engaged in an illegal conspiracy. But yet,
17 when one is arrested, the dominant person, the one who's
18 making all of the decisions who the Government is going to
19 allege was directing people to do things in a conspiracy, he
20 finds it bizarre. And, so, while the Government can argue to
21 the jury oh, this was just a false exculpatory, this isn't
22 really true, he was making it up, that's an issue for the jury
23 and that's what they said in DeMaria. And I think the
24 Government's argument about the truth of the statement was
25 exactly what the Government argued to the district court in

1 DeMaria that resulted in vacating the conviction.

2 THE COURT: Let me think about it because I think
3 generally the statements that you have proffered would not be
4 admissible. This particular statement, since it is part of a
5 videotape and I do remember looking at, I don't know whether
6 it was the entire one or just an excerpt, I am going to look
7 at it again and hope that I can be guided by the DeMaria case.

8 MR. BRODSKY: Thank you, Your Honor.

9 THE COURT: When I decide in terms of the
10 Government's argument and the defense argument whether this is
11 as issue of admissibility or whether it is an issue of weight
12 and context and credibility is something that I would like to
13 be refreshed on.

14 MR. BRODSKY: Thank you, Your Honor.

15 THE COURT: I think you have provided me that disc
16 before.

17 MR. KESSLER: We can re-provide it.

18 The one thing I had, while the Court is considering
19 this, if what Mr. Brodsky said is actually, the hearsay
20 exception and the truth or falsity of the statement doesn't
21 matter, then anything Martin Shkreli said at any point could
22 be admitted because it would be what he was saying, true or
23 false. The rule is circumscribed. The rule is very specific
24 and it limits the kind of admissibility. We are happy to
25 provide the video.

1 MR. BRODSKY: That argument also was made in DeMaria.

2 THE COURT: What else?

3 MR. BRODSKY: What I would turn to next, Your Honor,
4 is really critically important. It came up in pretrial
5 motions before Your Honor with respect to Mr. Brafman to move
6 for it but then withdrew the motion.

7 THE COURT: Which one is this?

8 MR. BRODSKY: This is the grotesque threat that Mr.
9 Shkreli made to make Tim Pierotti and his four children
10 homeless. There is no question it's abominable, it's
11 grotesque, it's unconscionable. When you tell that to the
12 average person, that this is what a human being did to another
13 human being and they wanted to make them homeless and their
14 four children homeless, you get emotional reactions. Having
15 three children myself, I have an emotional reaction
16 immediately to it. It's not a financial threat when you make
17 somebody homeless. It is just completely devastating to the
18 family. It is complete destruction. So what we ask, Your
19 Honor, is that particular evidence that Mr. Shkreli, not Mr.
20 Greebel, but Mr. Shkreli made this threat in that letter and
21 other locations, maybe by e-mail, maybe otherwise, he made
22 this threat to make Mr. Pierotti's family, wife and four
23 children homeless, that should not be in this trial.

24 First, the Government concedes that they don't have
25 any evidence, not a shred, not a shred of evidence that Mr.

1 Greebel knew about, in advance, Mr. Shkreli's threat to Mr.
2 Pierotti to make his wife and children homeless. And that is
3 critical, because this isn't a case about Mr. Shkreli, this is
4 a case about Mr. Greebel and Mr. Greebel did not make this
5 threat. That is point number one.

6 Point number two, Your Honor, is the Government
7 relied on 404(b) in their motion. They said that, "Evidence
8 of Shkreli's harassment of Fearnow share recipient TP, aided
9 by the defendant," referring to Mr. Greebel, "is admissible
10 pursuant to Rule FRE 404(b) as evidence of the Defendant's
11 knowledge of the object of the conspiracy he agreed to join,
12 the Defendant's intent and his lack of mistake in assisting
13 Mr. Shkreli in seeking to control the Fearnow shares." That's
14 the Government's motion in limine at page 6 to 7. The problem
15 with that is that the case law is clear, it is unmistakable
16 and it is in the advisory committee notes of 404(b), that this
17 rule of 404(b) only relates to evidence of an accused
18 extrinsic acts; it doesn't relate to a non-defendant's
19 extrinsic act. This is an extrinsic act of Mr. Shkreli. It
20 is not an extrinsic act of Mr. Greebel that this threat was
21 made.

22 The third point I would make, Your Honor, is that
23 the probative value of this, of this highly charged and
24 inflammatory evidence is outweighed by its prejudicial effect
25 in spades and we cite United States v. Garcia which vacated a

1 conviction based on the risk of prejudice arising from the
2 admission of evidence that is clearly outweighed by any
3 marginal probative value. Since this is a threat by Mr.
4 Shkreli, which there is no evidence that Mr. Greebel had
5 advance knowledge of or condoned or supported in advance, what
6 is the probative value to Mr. Greebel.

7 They are arguing in their papers that when Mr.
8 Greebel learned about it after the fact, because in the course
9 of what happened was, Your Honor, apparently this threat was
10 made in or about December of 2012 or early 2013, at some point
11 in the spring of 2013, the Katten law firm, not just Mr.
12 Greebel, but the Katten law firm, with some senior litigators
13 at Katten, decided to file a lawsuit against Mr. Pierotti
14 based on what information they had from e-mails and other
15 documents and talking to Mr. Shkreli. So they filed this
16 lawsuit. I understand the Government's going to introduce
17 evidence of the lawsuit and they are going to be able to have
18 Mr. Pierotti testify that a lawsuit was filed against him and
19 that this was intimidating and they are going to go through
20 the lawsuit, but what they shouldn't be able to do is when Mr.
21 Greebel learned about it, when other Katten lawyers learned
22 about it, and they learned about an allegation that was made
23 between two litigants against each other, they should have --
24 Mr. Greebel should have done something about the threat made
25 by Mr. Shkreli to Mr. Pierotti's family. The problem is, in

1 litigation, with two people yelling and screaming at each
2 other, we represent parties all the time that have disputes
3 over the facts, the Government should not be able to allege or
4 infer to the jury that Mr. Greebel's guilty of a criminal
5 conspiracy because, and others at Katten, when they learned
6 about this alleged threat, they don't go to Mr. Shkreli and
7 fire him when Mr. Shkreli's firm -- his company is a client.
8 So I don't think there is any probative value and the
9 prejudicial effect is huge.

10 And, finally, Your Honor, the Government seems to
11 rely throughout their briefing on United States versus
12 Al-Moayad, 545 Fed 3rd 139, Second Circuit case, 2008. And
13 that's a case where the Second Circuit vacated convictions
14 because "Highly charged and emotional," testimony with,
15 "minimal evidentiary value," was introduced. This is squarely
16 that. The Government has the evidence of Mr. Pierotti. They
17 have the evidence of Mr. Pierotti's testimony and the lawsuit
18 that was filed against him. To bring up this threat to make
19 the family homeless goes an extreme step too far and will
20 poison the jury against our client. That's how we feel about
21 that, Your Honor.

22 THE COURT: Thank you.

23 MS. SMITH: Your Honor, I want to kind of -- I think
24 there were some aspects of the facts that were not -- we
25 disagree about the facts related to the original harassment

1 and then the hacking, which I do want to raise, because we had
2 said in our reply brief that we were not going to discuss the
3 hacking if the defense didn't go into it. I think the
4 information that we have learned in the past few weeks has
5 changed our position on that. I just want to make it clear
6 kind of the timeline of events and why we think that this is
7 actually very important evidence of the conspiracy charged in
8 Count Eight.

9 Mr. Shkreli was trying to get the shares back from
10 Mr. Pierotti, as you remember, and there was an escalating
11 series of events and it culminated in January of 2013, in
12 part, in this letter that was sent threatening to make him
13 homeless. Mr. Pierotti and Mr. Shkreli continue to try and
14 discuss whether or not he's going to return the shares; Mr.
15 Shkreli kept asking for them. Mr. Greebel gets involved
16 before the Katten firm gets involved. He was involved before.
17 He was advising Mr. Shkreli regarding the "over the wall
18 e-mail" and all of these other threats to try and get it back.
19 He is on the original e-mail that says I am going to sue you.
20 And then Mr. Pierotti, in dealing with Mr. Greebel, advises
21 Mr. Greebel specifically, not lawyers at Katten, about the
22 threat. He cuts and pastes part of the letter and I think
23 that is in our briefs. Mr. Greebel does not share that
24 information with other attorneys at Katten. That is not
25 information that is known generally. It is information that

1 is kept between Mr. Shkreli and Mr. Greebel.

2 It is not known to the Katten attorneys until Mr.
3 Pierotti files an affidavit in January or February of 2014
4 which lays out both these original threats and then the
5 hacking. So this threat is right in the middle of where Mr.
6 Greebel and Mr. Shkreli are working together to get the shares
7 back. Ultimately, Mr. Greebel pulls in the Katten firm to try
8 to actually effectuate the lawsuit. But in the beginning, in
9 this crucial time period, it's the two of them and that threat
10 is, like I said, kind of the culmination of this course of
11 behavior that Mr. Greebel is involved in at that same time
12 period.

13 With respect to the hacking, it's our understanding
14 that the hacking occurred around Christmas of 2013. Mr.
15 Shkreli hacked a number of Mr. Pierotti's personal accounts,
16 as well as accounts of his family. The Katten law firm, not
17 only Mr. Greebel, but also other individuals at Katten, learn
18 of the hacking. In fact, Mr. Shkreli confesses that he was
19 the one who did the hacking and this is part of the reason why
20 the lawsuit wound up getting settled, obviously because this
21 accusation that there was this hacking. And when Mr. Greebel
22 is describing the settlement to the board, he not only
23 describes the settlement incorrectly and leaves out
24 information related to the Fearnow shares and affirmatively
25 misrepresents the Fearnow shares that are involved in the

1 settlement, but he also fails to mention his knowledge of the
2 hacking, which obviously is a federal crime, that, you know,
3 their client is running around doing this with the CEO of
4 Retrophin. So that is actually also relevant in the sense
5 that it is not only this initial threat and attempts to
6 control the Fearnow shares, but at the end of the entire
7 process with the settlement, which involves 50,000 Fearnow
8 shares that were held in escrow that belonged to Mr. Pierotti
9 that Mr. Greebel and Mr. Shkreli conspired to prevent him from
10 getting at the end, which further shows control.

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12 (Continued on next page.)
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1 (Continuing)

2 MS. SMITH: There are also affirmative
3 misrepresentations, as well as omissions made to the board
4 members about the settlement of that lawsuit.

5 So I just wanted to kind of lay out those facts in
6 full. I think that the legal arguments have been made pretty
7 clearly in our brief. I will just say that the 404(b) was in
8 the alternative, and I certainly think that Mr. Greebel's
9 aiding and abetting of this course of conduct, you know, we
10 don't believe that has 404(b). We believe it's direct
11 evidence, but we threw that in as kind of a backstop. In
12 addition, it would be evidence that would fall under 404(b).

13 MR. BRODSKY: And, Your Honor, what I'd like to do
14 in response is hand up to Your Honor the 3500 material that we
15 just received this week.

16 For the first time Your Honor should know that the
17 Government, prior to the indictment -- we've already told you
18 this -- the Government never spoke to anybody at Katten, and
19 never saw documents from anybody at Katten. Before the
20 Shkreli trial, they never spoke to anybody at Katten. They
21 never got documents. They did get documents through this
22 discovery process.

23 The first time after the Shkreli trial they spoke to
24 witnesses from Katten, which is a good thing, and two of them
25 are specifically in those 3500 material. And the reason why I

1 point it out to Your Honor is, I do think it's relevant
2 specifically to this.

3 So what Ms. Smith said was, she put a lot of things
4 on the board, you know. She threw a lot of stuff in there.
5 There was at threat. Then there was the hacking. Then there
6 was representations to the board. So I just want to unpack
7 that, because our motion is about the threat, and I think we
8 should focus on the threat.

9 I heard Ms. Smith say that Mr. Greebel learns about
10 the threat from Mr. Pierotti before other partners at the law
11 firm. And then I heard her say that he doesn't share it with
12 the other partners. That's factually inaccurate, and we can
13 prove it.

14 But put that aside. Mr. Greebel's other partners
15 learn about the same threat, exactly the same threat, that
16 Mr. Shkreli allegedly makes, and makes with the same
17 information. Because what happens, Your Honor, is when
18 Mr. Greebel is representing Retrophin and the Pierotti dispute
19 arises, Mr. Greebel doesn't keep it for himself, between
20 himself, and Mr. Shkreli.

21 What he does, in an unusual move, according to the
22 Government being a co-conspirator, an alleged illegal
23 conspiracy, what he does is bring in two senior partners,
24 litigators at the law firm, and he asks those litigators to
25 take charge of the litigation. And those litigators -- and

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1 those are the 3500 material that I handed up to you -- those
2 litigators who were interviewed within the last couple of
3 weeks by the Government, those litigators take charge of the
4 litigation. And at some point, they learn about this exact
5 same threat.

6 And the Government doesn't allege, because they
7 learned about the threat, that Mr. Shkreli apparently makes to
8 make Mr. Pierotti's family and his wife and his children
9 homeless, that somehow that implicates those two partners.
10 And somehow that makes those two partners involved in
11 something vial and inappropriate. I'll put that aside. Or
12 illegal.

13 And so I'd like to focus on that. Ms. Smith said
14 that threat makes Mr. Greebel involved in it. That's a quote.

15 Now, Mr. Greebel was not involved in the threat. He
16 didn't know about the threat in advance. Did he learn about
17 it afterwards? Yes.

18 Did other Katten partners learn about it afterwards?
19 Yes.

20 The knowledge about the threat in the context of
21 litigation between two parties who are fighting each other,
22 and killing each other, over very different views about those
23 Fearnow shares, that does not make evidence probative of
24 what's in Mr. Greebel's state of mind. And even if there was
25 some minimal probative value to it, how depressing and sad is

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1 it, that we can't recognize how highly inflammatory and
2 grotesque that evidence will have on a jury which will
3 undoubtedly have members who have families.

4 And anybody who learns about that you want to make
5 somebody homeless, and make them -- their kids homeless, will
6 have a visceral emotional reaction.

7 And so we respectfully, Your Honor, they can get in
8 the litigation. They can get in this alleged -- they want to
9 get in alleged hacking evidence. They can try to get in
10 alleged hacking evidence. We certainly know a lot about that
11 and we are certainly prepared to defend it.

12 But if they want to get into this threat to make
13 some kid homeless? That goes one step too far and that should
14 not be permitted.

15 Now, with respect to their allegations, with respect
16 to what representations were made to the board, or not made to
17 the board by Mr. Greebel, we're a hundred percent prepared to
18 address that. That's not part of our motion.

19 Our motion is squarely concerned about this threat
20 to make a family and children homeless. And I haven't heard
21 why that is so much -- that that has so much probative value
22 that it outweighs the highly inflammatory affect it will have
23 on the jury, especially when other Katten partners learn about
24 it.

25 THE COURT: Okay. What I am understanding is that

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1 Mr. Greebel became aware of this threat at least by
2 February 14th, 2013.

3 MR. PITLUCK: That's right, Judge.

4 MS. SMITH: Yes, that's correct.

5 THE COURT: And that at that point -- and that was
6 when Mr. Pierotti informed Mr. Greebel that this happened.

7 MR. BRODSKY: Correct.

8 THE COURT: The threat was made on January 15th,
9 2013, or at least that is when the letter was dated.

10 MR. BRODSKY: He doesn't receive a copy of the
11 letter, as I understand it, Your Honor. He receives some
12 quotes in an e-mail.

13 THE COURT: So, yes. But the part that you find to
14 be terribly inflammatory.

15 MR. BRODSKY: Correct. Those parts.

16 THE COURT: And worthy of exclusion, is revealed to
17 Mr. Greebel on February 14th, during the time that he is
18 negotiating with Mr. Pierotti about getting those shares back.

19 MR. BRODSKY: There was unquestionably two versions
20 of what happened at MSMB and Retrophin when Mr. Pierotti, as
21 he testified, said what Mr. Shkreli said, and Mr. Shkreli had
22 a completely different view. And in that context --
23 Mr. Greebel is not present for that. But in that context of
24 the heated litigation between two people who are warring
25 against each other, where Mr. Shkreli, on the one hand says, I

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1 arranged to broker and provide these shares, these freely
2 tradable shares, to a number of individuals in exchange for
3 their commitment to work for the company, because I have no
4 money.

5 This is what Mr. Shkreli is telling people.

6 THE COURT: I know, but you interrupted me.

7 MR. BRODSKY: Oh, I'm sorry, Your Honor. I
8 apologize.

9 THE COURT: That same day, Mr. Greebel forwards the
10 e-mail to Mr. Pierotti, to Mr. Shkreli, and says his response.
11 That's it. I mean, that is all he says, his response.

12 MR. BRODSKY: Yes.

13 THE COURT: And then Mr. Shkreli directs him to bury
14 Mr. Pierotti; sends money a month later to Katten and wants to
15 sue Mr. Pierotti. And they do so on March 26th, after
16 receiving the money and the directive from Mr. Shkreli.

17 Now, the 3500 material that you handed up --

18 MR. BRODSKY: Yes.

19 THE COURT: -- from Mr. Cotton indicates that,
20 Mr. Howard Cotton, becomes aware of this harassing e-mail in a
21 court filing. And he would have expected that E.G. -- I am
22 assuming Mr. Greebel?

23 MR. BRODSKY: Yes.

24 THE COURT: -- to have made him aware of such an
25 issue beforehand. Had it been known, because it would have

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1 had significant influence on the litigation.

2 So it appears at least Mr. Cotton was not aware of
3 this until the court filing by Mr. Pierotti.

4 MR. BRODSKY: When we proffered to Your Honor
5 without laying out all our evidence --

6 THE COURT: I mean, I am just seeing this.

7 MR. BRODSKY: I hear you, Your Honor.

8 We proffering to Your Honor, without laying out our
9 evidence, because we don't want to lay out what our sources of
10 information, and all our documents that point out to the
11 Government where they're missing stuff, and where they're
12 misstating facts, we will let them do that in their opening.
13 But I proffer to Your Honor that we will introduce evidence,
14 through either testimony or otherwise, that Mr. Greebel
15 informs people, and that this threat, in the context of heated
16 litigation between two parties, does not stop the litigators
17 from Katten from representing Retrophin in filing their
18 lawsuit against Tim Pierotti. The lawsuit is Retrophin
19 against Tim Pierotti --

20 THE COURT: The threat is made before the
21 litigation --

22 MR. BRODSKY: Correct.

23 THE COURT: -- starts in January.

24 MR. BRODSKY: Correct.

25 But they learn about it -- without dispute, these

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1 senior litigators at Katten learn about it and they continue
2 with the lawsuit. And so the probative value that this --
3 what the Government says is that this threat by Shkreli
4 somehow evidences that Mr. Greebel did something wrong.

5 THE COURT: Well, I think what they are arguing is
6 that it is evidence that he continued to conspire with
7 Mr. Shkreli to obtain control over the Fearnow shares.

8 MR. BRODSKY: But, Your Honor, if you're in a
9 conspiracy -- and I don't mean to interrupt you -- but if
10 you're in a conspiracy, if you're in a legal conspiracy, in a
11 legal conspiracy with Mr. Shkreli -- I'm at a premier law
12 firm, one of the best law firms in the world, with some of the
13 best litigators in the world -- I will exclude other law
14 firms, one of the best law firms in the world, and they are --
15 would you include your senior litigators and they learn about
16 this alleged threat and somehow that's still evidence that
17 Mr. Greebel did something wrong?

18 What the Government wants you to do is transport
19 yourself into the mind of Mr. Shkreli, and have them acting
20 parallel with each other. But we all know Mr. Shkreli duped
21 people all the time.

22 And so the Government doesn't want to accept that
23 fact about Mr. Shkreli, that he duped Mr. Greebel, and the
24 problem is, Your Honor, they're going to get into the
25 evidence.

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1 Let me put it this way, Your Honor. They're going
2 to get in the evidence of the lawsuit. They're going to get
3 in the evidence, apparently, of some hacking. They're going
4 to get in evidence, apparently, of misrepresentations to the
5 board over the litigation.

6 What I have -- what we have a real problem with is
7 the highly inflammatory part about making your kids homeless.
8 That's going to cause jurors to have an emotional reaction and
9 that's our problem with it.

10 It's 404(b) extrinsic conduct done by Shkreli.

11 THE COURT: But it is direct evidence of the
12 conspiracy as well, because the idea -- the whole point of the
13 conspiracy was to control these shares, and Mr. Shkreli, you
14 know, is trying very hard to get those shares back from
15 Mr. Pierotti.

16 MR. BRODSKY: Understood.

17 THE COURT: Right?

18 MR. BRODSKY: But in the context of the litigation,
19 Mr. Greebel learns about it. The Government admits it
20 acknowledges that he doesn't know in advance.

21 THE COURT: No, he does know about it as of
22 February 14th.

23 MR. BRODSKY: But not before.

24 MS. SMITH: Your Honor, this is --

25 MR. BRODSKY: I'm sorry. If you allow me. If you

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1 allow me.

2 The threat occurs; right?

3 THE COURT: In January. Mr. Greebel learns about it
4 at least by February 14th. The litigation starts --

5 MR. BRODSKY: But that's after the fact.

6 THE COURT: Yes. But the -- he continues to try to
7 negotiate with Mr. Pierotti to get those shares back, and then
8 brings his firm into it and they start a litigation.

9 I mean, I think that the Government has proffered
10 this as direct evidence of Mr. Greebel's participation in this
11 conspiracy that has a number of different evolving actions by
12 Mr. Shkreli and Mr. Greebel, vis-a-vis Mr. Pierotti, to get
13 control of those shares.

14 MR. BRODSKY: I understand, Your Honor. But he's a
15 partner, an income partner, at a law firm. He brings in a
16 senior equity partner at the law firm to litigate the case.
17 They get access to all of Mr. Shkreli's documents. They get
18 access to all his e-mails and they pull them.

19 They write the complaint, not Mr. Greebel. They
20 learn about the alleged threats and continue with the
21 litigation. Their clear view, as reflect would in the 3500
22 material, is that this lawsuit was valid and just. They don't
23 say it was an invalid lawsuit. They don't drop the lawsuit
24 when they learn about this alleged threat. They continue on
25 with the lawsuit.

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1 And so the notion that somehow after the fact, if
2 you learn about it --

3 THE COURT: So maybe the Katten partners did not
4 find it as inflammatory and difficult as you claim. You know,
5 it did not deter them. If your argument is carried out, it
6 did not deter them from continuing the litigation, even
7 knowing, after the fact, that he had made this threat.

8 MR. BRODSKY: Yes, Your Honor.

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10 (Continued on following page.)

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1 (Continuing)

2 MR. BRODSKY: Yes, Your Honor. To litigators like
3 me, you would have to really stretch it to shock the
4 conscience because we have seen lots of things, but to a jury
5 that doesn't know litigation and how heated it is between
6 parties, if they learn about this threat, I am afraid that it
7 doesn't matter what the evidence will be after that. It will
8 all won't matter. What the jury will say is, you know what,
9 you Katten, you lawyer, you shouldn't have represented anybody
10 in this. I had enough of you.

11 THE COURT: Are you finished?

12 MR. BRODSKY: Yes, Your Honor.

13 THE COURT: Okay.

14 MS. SMITH: Your Honor, I just wanted to make sure
15 that the timing is clear, but I think you have it, that the
16 threat happened in January. In February, Mr. Greebel learns
17 about it. The lawsuit isn't brought until March. So in terms
18 of the heat of the litigation, there is no litigation at that
19 point. The other partners don't find out about it until
20 January of 2014.

21 Mr. Brodsky just keeps retreating to prejudice,
22 saying it is really going to make your family homeless, which
23 was discussed, which came in at the last trial. I think these
24 are all jury arguments, frankly, but they are not a basis to
25 preclude this evidence.

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1 MR. BRODSKY: The partners of the law firm learn
2 about it long before January 2014, long before. We will be
3 able to prove that.

4 THE COURT: Mr. Cotton does not learn about it until
5 the Court filing. He is described here as an equity partner
6 and says it wouldn't have had an effect on his decision to
7 involve the firm in this litigation or, at least, it was a
8 significant piece of knowledge that he was not aware of.

9 MR. BRODSKY: I understand, Your Honor, but the
10 threat itself is so vile and what is the probative value of
11 it?

12 THE COURT: It is being proffered as direct evidence
13 of Mr. Greebel's involvement in the conspiracy.

14 MR. BRODSKY: If they had evidence -- I won't repeat
15 myself and move on to the next point, but if they had evidence
16 he knew about it in advance, that's one thing. But when
17 you're a lawyer and you represent a company and you learn that
18 the CEO of the company has made an alleged threat against
19 somebody and they are both in heated litigation, from my
20 perspective, where I sit, that can happen to me. And does it
21 suggest that somehow that can be used as evidence, that if you
22 are the lawyer and you continue with a lawsuit in the context
23 of heated litigation, learning about it after the fact that
24 can be probative of your mindset?

25 THE COURT: No, Mr. Brodsky. I think the timing,

1 again. The lawsuit is not brought until a month later, after
2 the attempts by Mr. Shkreli and Mr. Greebel to retrieve the
3 shares from Mr. Pierotti. They are not successful, so they
4 bring this lawsuit and they talked about a restraining order.
5 My point is is that the evidence that the Government wishes to
6 proffer is among a series of steps and communications and
7 plans and agreements to wrest those shares back from Mr.
8 Pierotti. And I believe there is not evidence, as the
9 Government admits, that Mr. Greebel did not know about it in
10 advance, but once he did learn about it, all he said to Mr.
11 Shkreli was his response. He did not say this is going to
12 make it very difficult to litigate, I'm not going to bring
13 this lawsuit to my partners to bring, I think that you might
14 have put yourself in danger or crossed the line.

15 I think when he did the "over the wall" e-mail, that
16 is what it is being referred to, he says he likes it, that the
17 notion of trying to get Mr. Pierotti to become an insider and
18 to be restricted in how he uses the Fearnow shares.

19 So I think that in context this is the Government's
20 evidence of the conspiracy and I do not find that this alone
21 is particularly so outrageous or so shocking that it certainly
22 was not enough to deter the law firm from taking on the
23 lawsuit or even -- I mean, they did not know about it. So it
24 did not deter Mr. Greebel from recommending that the suit be
25 filed and I think that is evidence of, as the Government says,

1 of the conspiracy.

2 MR. BRODSKY: But what the Government learned from
3 Mr. Cotton and Mr. Howard was before the lawsuit was filed.
4 They were in charge of it and they did their own due diligence
5 and they did their own work on it. So they put their names,
6 not Mr. Greebel's name, on the litigation.

7 They filed the litigation, proceeded with the
8 litigation, even after learning about the threat. Again,
9 that's in the context of two heated parties against each
10 other. All I would ask, Your Honor, is that you consider, as
11 you look at this -- you will have all these pieces of evidence
12 of litigation and so on and all of this effort made to stop
13 Pierotti. They have all of that. That is a mountain
14 according to them.

15 But the lines in the letter and in the e-mail that
16 talk about making you and your four children homeless and I
17 will do whatever it takes, those are the ones that we are
18 asking to redact. Those are the ones we are asking Your Honor
19 because we really feel that a jury will not look at the
20 evidence fairly and all they are going to do is have an
21 emotionally visceral reaction and that is human nature.

22 I will move on to my next issue, Your Honor, and
23 that respectfully is with respect to compensation. And I
24 start with this Your Honor: What we are moving to preclude is
25 evidence that of the particular salary that Mr. Greebel made

1 each year, the bonus that he received each year and the total
2 amount of money billed, the dollar value that was billed to
3 Retrophin.

4 And the reason, Your Honor, we rely on the United
5 States versus Ferguson case, Judge Droney, then a district
6 court judge in Connecticut now on the Second Circuit laid out
7 the critical test on the admissibility of alleged evidence of
8 compensation in connection with charges and there were two
9 specific things in United States versus Ferguson the judge
10 said.

11 Before I get into Ferguson, I should tell Your Honor
12 what we're really concerned about is, as we know, lawyers are
13 not beloved. I can hand up to Your Honor a Pew Research
14 study. And we laugh about these things, but this is a jury
15 that is reflective of the public. And this is a study that
16 was done by the Pew Research Center on July 11, 2013 and I'm
17 sure the statistics aren't better today. And in the third
18 paragraph, they said among the 10 occupations the survey asks
19 respondents to rate, lawyers are at the bottom of the list.
20 About one in five Americans, 18 percent, say lawyers
21 contribute a lot to society. While 43 percent say they make
22 some contribution, fully 34 percent say lawyers contribute not
23 very much or nothing at all.

24 And if you look at the list for all the trends in
25 perceived contributions to the society, lawyers are at the

1 bottom. Now, respectfully, I submit Your Honor, most of us
2 being lawyers in here, they are wrong, but nevertheless,
3 that's the public perception and the public perception is that
4 lawyers are greedy, right? So most people say lawyers are a
5 bunch of greedy people; they're not to be trusted. And let's
6 not forget we have an attorney as a client.

7 So in United States versus Ferguson, which I will
8 turn back to, what Judge Droney said was there were two types
9 of evidence about compensation the Government wanted to admit:
10 One had a direct linkage between the compensation and the
11 actual charge; the other had no linkage. In that case the
12 defendant, Milton, moved to preclude the admission of his
13 salary and bonus at AIG. The Government had alleged a big
14 fraud, that he was inflating the price of AIG stock.

15 Without a doubt, the Government argued, hey look, by
16 inflating the price of AIG stock he know he was going to get a
17 bigger bonus. Now, maybe logically that could make sense,
18 what Judge Droney knew was the Second Circuit case law, which
19 he cites that says evidence of wealth is inadmissible.
20 Evidence of your compensation is inadmissible. That is United
21 States versus Stahl, 616 Fed 3rd 30, Second Circuit 1980,
22 which reversed a conviction because of that.

23 THE COURT: What rule did he invoke to make that
24 ruling?

25 MR. BRODSKY: What he said was there is no evidence

1 directly correlating the compensation, the salary, the bonus
2 and the inflation of the AIG stock. There was no one-to-one
3 correlation. You could come up with a theory, but there was
4 no one-to-one correlation.

5 What he said was, it wasn't direct. It was
6 attenuated. And he said what could come into evidence was the
7 deferred compensation of Milton because Milton had AIG stock
8 in his deferred compensation plan and if he inflated the value
9 of the stock, his compensation plan was richer. So that was
10 just direct evidence.

11 Here, Your Honor, what the Government wants to
12 argue, and I have a series of documents for you because the
13 Government just produced them with a particular chart -- it
14 was just produced yesterday for the first time. What we
15 respectfully submit, Your Honor, is without a direct tie
16 between the compensation and the bonus to Retrophin, it should
17 not be admissible.

18 What the Government wants to argue is Mr. Greebel
19 was making a lot of money, that he then got a bonus and then
20 the bonus went up at some point and that was at the same time
21 that he brought in this business with Retrophin and,
22 therefore -- and he was working hard and, therefore, that's
23 the tie. That's what Judge Droney precluded: Speculation,
24 inference upon inference. What I have to rely on, Your Honor,
25 in that regard is the evidence that the Government just

1 produced to us yesterday which fully supports our case.

2 Now, the Government also produced 3500 material of
3 the head of -- one of the heads of the compensation partner
4 committee, the income compensation partner committee from
5 Katten that they just talked to within the last few weeks at
6 the time. And this person said, if you read it, that there is
7 no -- in sum and substance, that they look on a lot of
8 wholistic factors to determine the income and bonus of an
9 income partner. There is no one factor. They talked about
10 there's performance, there's contribution. There's lots of
11 different data that they look at: Billable hours, receipts,
12 realization rates.

13 And there is no evidence, to our knowledge, that any
14 witness is going to say at Katten your compensation was
15 directly determined based on a particular company or a
16 particular client or a particular billable number.

17 And the proof of that, Your Honor, is in the actual
18 numbers. And I bring this up, Your Honor, because I just got
19 it yesterday and I asked Your Honor to put it under seal; in
20 other words, I don't think this information should be publicly
21 disclosed. I think that this information, respectfully,
22 contains data and private information of individuals that
23 should not be for the public consumption.

24 MS. SMITH: Your Honor, just to be clear, I don't
25 know what version Mr. Brodsky has, but in the version that we

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1 produced, we have redacted all of the names of all of the
2 partners who are not Mr. Greebel. Because it is a list -- and
3 I can go into it -- each year of all of the income partners.
4 I believe we got 2013 and 2014.

5 MR. BRODSKY: Yes.

6 MS. SMITH: So it includes every income partner in
7 the entire country for Katten, and when we produced it to
8 Mr. Brodsky, it doesn't look like this; we had it in a
9 different format from Katten. So I don't know where this came
10 from. It actually has all of the names redacted so that we
11 wouldn't have to worry about this issue.

12 MR. BRODSKY: Your Honor, what I want to do is hand
13 it up to you and take it back. I won't name any of the
14 people. We got this information from Katten because Katten
15 said they produced it to the Government.

16 THE COURT: Was that a document from Katten or did
17 you recreate the document?

18 MR. BRODSKY: I didn't recreate anything. They say
19 it's the same information that was given to the Government. I
20 asked them could you give us a copy, we haven't received it
21 from -- what happened was, Your Honor, we learned from Katten
22 that they produced documents to the Government. We had not
23 received it yet. So I asked Katten would you mind giving me
24 exactly what you produced to the Government because I would
25 like to get that information, I haven't received it from the

1 Government yet.

2 And I'm glad I did because I got it in time for the
3 oral arguments. I am handing it up, Your Honor, only because
4 I feel that this information is proof --

5 THE COURTROOM DEPUTY: Do you have another set?

6 MR. BRODSKY: I do have another set. Yes, of
7 course. I'm sorry. I feel this information, Your Honor, is
8 exactly what the income partner committee head was talking
9 about when he spoke to the Government. We have not spoken to
10 the income partner head, but if you indulge me for one moment,
11 Your Honor, and you take a look at the first document which,
12 in the upper left hand corner, says, "Sorted by FYE 2013
13 target compensation." It has one of ten pages and it has a
14 Bates number of KAT USA0 398 through 407. So those are the
15 USA0 Bates numbers that are on the documents given to the
16 Government that we then asked for because we hadn't received
17 them from the Government.

18 And if you look at the second page of that first
19 document highlighted at the bottom, you see the compensation
20 of Mr. Greebel, and I direct your attention, Your Honor, at
21 the bottom of the second page, 2 of 10, it has Evan Greebel's
22 name and it is highlighted. It has a list of all these other
23 income partners of all sorts. It has at the top, "Note: All
24 compensation is annualized deal" and the first column there
25 says "Fiscal year end 1/31/2010." (Continued on next page.)

1 (Continuing)

2 MR. BRODSKY: So that applies for 2009 through the
3 end of January of 2010.

4 The next column, FYE 1/31/2011, is the fiscal year
5 of 2010 through January 2011. The next column is through
6 January of 2012, and the next column is through January of
7 2013.

8 And so if I think about it this way, it's really
9 calendar year 2009 plus a month, 2010, 2011 and 2012.

10 And if you look at Mr. Greebel's compensation -- and
11 again, I'm just not going to say the numbers -- you notice
12 that in 2010 it goes up; right? It goes up. But then it goes
13 down. It drops. It drops over the next two years.

14 And what I note for Your Honor is that exactly what
15 Mr. Silverman told the Government, there is no way to
16 correlate compensation with particular billings or particular
17 numbers. Example one, I offer, Your Honor -- and I'm not
18 going to name who the person is -- but example number one
19 highlighted on the fifth item, line item down, after it says
20 officer. Five line items of people, five different names.

21 Without the naming the initials of the particular
22 person in that fifth line item, what you see there is an
23 example of somebody who has the same hours as Mr. Greebel back
24 then for two years. He had almost no receipts, what they
25 called shared receipts, which is billable work coming in. He

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1 had almost no principle receipts. But he made more money.
2 And his compensation went up.

3 And then example number two at the top, the very
4 first line.

5 THE COURT: I think we are on a different page. Oh,
6 I see, okay. You are on page 2, sorry.

7 MR. BRODSKY: Yes, I am on page 2. Again, page 2,
8 fifth person.

9 THE COURT: Yes.

10 MR. BRODSKY: If you look over at the hours, they
11 have billable hours.

12 THE COURT: Yes.

13 MR. BRODSKY: And the total of hours, that's a
14 person who worked extremely hard. And over a two-year period
15 worked the same amount of time as Mr. Greebel.

16 And in the last period of time, increased it. And
17 yet, despite working the same amount of hours with almost no
18 receipts, shared receipts as compared to Mr. Greebel who had a
19 lot more shared receipts and principle receipts, which, as I
20 understand it, is sort of credit for work coming in, that
21 person makes a lot more money.

22 And then the first line of the first person there,
23 you see this person's salary bounced up and down a little bit,
24 but that person worked very little hours. I mean, I'm sorry
25 to say that, but I'm not naming who they are. That person in

1 the first line certainly compared to a Gibson Dunn lawyer, and
2 compared to every other Katten lawyer I see, they didn't work
3 that hard that year. But despite not working that hard and
4 certainly compared to Mr. Greebel, they were making a lot more
5 money. And their receipts were not as high as Mr. Greebel.

6 And then I turn to the first page, and I offer two
7 more examples, Your Honor. And I did this last night at
8 11:00 p.m. with about 30 minutes to do it before I wanted to
9 get home and get to sleep before today's hearings. I could
10 crunch these numbers in a thousand different ways, and it
11 appears that people, no matter what their receipts are, or the
12 amount of their hours are, the income partners are making
13 money in a variety of ways. So there's no correlation between
14 your actual compensation and bonus to a particular billable
15 hour.

16 And what the Government wants to do -- and very
17 respectfully, Your Honor, I know your time is short -- but
18 this issue is so critical to us because, given the pure
19 research and given how people think lawyers are greedy, and
20 given that they think only 18 percent of the country
21 apparently respects a lawyer today, the Government wants to
22 introduce a series of compensation memos, which I will hand up
23 to Your Honor. And I will provide copies to everybody. But
24 they want to put in a series of compensation memos,
25 Your Honor, which are pro forma, which are compensation memos

1 that the Government is very familiar with. They're
2 compensation memos which every partner at the law firm, income
3 partner, or partner, has to submit at year-end, or whatever
4 the time period is at Katten. It appears to be early the
5 following year. And what this information does is, you are
6 supposed to lay out in a pro forma style, the information that
7 your compensation and what work you've contributed and what
8 you've done.

9 And the problem, Your Honor, is admitting this
10 testimony is inherently prejudicial because of the Stahl
11 decision and related progeny that say that somebody's wealth
12 is inherently prejudicial for a jury to see.

13 You add on the fact that there's no way to tie bonus
14 and income directly to Retrophin, or directly to a particular
15 client, or a particular matter, and you look at the
16 compensation memos. And this first one, for example, year-end
17 February 10, for fiscal year end January 31, 2012. There's a
18 lot of information there completely unrelated to Retrophin.

19 When Mr. Greebel was talking -- and this is for the
20 year of 2011 -- Mr. Greebel's numbers, for the most part,
21 don't reflect MSMB at that time. And a lot of what he's
22 talking about are matters totally unrelated to Retrophin.
23 Yes, he talks about Retrophin on the bottom of the first page,
24 I believe, although it's redacted. I think he's talking about
25 actually MSMB.

1 But on the second page, you have references to all
2 this type of work that Mr. Greebel is doing; business
3 development work, 1,100 hours on client development, on
4 roundtables, on dinners. He's authored two articles at the
5 request of Thomson Reuters for two books. He's doing all of
6 this work for all these different places exhaustively.

7 And then he's given the two pages in the last part
8 of what his compensation is. And there's no explanation.
9 There's no formula. There's no section that says plug these
10 numbers in and this is the amount of money you're going to
11 get.

12 And it's compensation memo after compensation memo,
13 with all respect to the Government, that proves that you can't
14 tie exactly what Mr. Silverman told the Government. You can't
15 tie a particular client or a particular matter to a dollar
16 value.

17 And so, with that, Your Honor, we respectfully ask
18 you to preclude the compensation. The evidence that the
19 Government has is not -- it's not going to tie to a particular
20 client. All it's going to do is potentially inflame the jury
21 that we have a lawyer who makes hundreds of thousands of
22 dollars, a bonus of significance, and you can't tie it. And
23 then what we'll have to do on our case-in-chief is try to put
24 on evidence that he had other clients. He had other matters.
25 His compensation was driven by a lot of different factors.

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1 And I would respectfully add, Your Honor, to all of
2 this, that the Ferguson case expressly talks about memos like
3 this. The Government wanted to admit in Ferguson before Judge
4 Droney that Maurice Greenberg, then the CEO of AIG sent out
5 these pro forma messages to people like Milton about what you
6 should do to perform. And the Government wanted to admit them
7 as evidence of incentive to commit a crime.

8 And what Judge Droney found in Ferguson was that's
9 pro forma. He wasn't going to allow the Government to imply
10 to the jury that these pro forma documents are somehow
11 evidence that someone has an incentive to commit a crime.

12 I personally, as a partner and my other partners in
13 the firm, find it quite scary that you can be a transactional
14 attorney, you can represent a company, the CEO of the company
15 could get into trouble for alleged fraud, and you
16 automatically are -- there's evidence that you're incentivized
17 to commit a crime because one factor, among many factors that
18 affect your compensation, is your work for this company.

19 THE COURT: Okay. Thank you.

20 MR. BRODSKY: Thank you.

21 THE COURT: Ms. Smith.

22 MS. SMITH: Your Honor, just briefly because it is
23 getting quite late.

24 THE COURT: I know.

25 MS. SMITH: In the Ferguson case, the case that the

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1 defense cites, the ruling was that information about the
2 defendant's wealth was not probative of any financial
3 incentive the defendant may have had to participate in the
4 alleged fraud scheme.

5 And then we have our own cases that we cited.
6 Quattrone and Bulgin, where the compensation was found to be
7 relevant to a motive to protect a reputation, or because a
8 defendant might participate in the crime because of pecuniary
9 motive. So that's what the cases say.

10 And here, Your Honor, I think, you know, Mr. Brodsky
11 has cherry-picked the evidence a little bit on the
12 compensation. And he also left out some other important
13 evidence.

14 As you know from the first trial, there are a number
15 of e-mails -- and I believe there will be many, many more at
16 this trial -- particularly in the time period around the time
17 of the Fearnow shares. So -- and the reverse merger, so kind
18 of November, December 2012, January of 2013, Mr. Greebel is
19 desperately hounding Mr. Shkreli to pay his legal fees. And
20 there's e-mail after e-mail and it's pay me this and pay me
21 that.

22 And MSMB no money, as Mr. Greebel knows. Retrophin
23 basically has no money at that point, as Mr. Greebel also
24 knows. So it's this constant back and forth about money. And
25 it's very clear that it's very important to Mr. Greebel. In

1 fact, he says it. He says he's getting hounded by his firm.
2 There's this entire context of it.

3 In fact, with the accountants, there's a whole
4 situation where Mr. Greebel is owed, I believe, close to
5 \$600,000 in legal fees for Katten for the MSMB entities. They
6 wind up -- Mr. Shkreli and Mr. Greebel wind up having that
7 paid out of Retrophin. And then that -- there's a whole back
8 and forth with the accountants because they don't understand
9 why Katten has been paid more than what the Retrophin bills
10 show, and Mr. Greebel is unwilling to explain that difference
11 to them.

12 So it's very clear that the comp was important from
13 the evidence that you have already seen.

14 THE COURT: Well, why can't that evidence just come
15 in without reference to Mr. Greebel's actual compensation?

16 MS. SMITH: So I'm going to explain that, because I
17 think that's the piece that's new for this trial.

18 THE COURT: Okay.

19 MS. SMITH: You know the comp memos, Mr. Brodsky
20 started in 2010, but the ones that are really kind of
21 probative of the conduct are the ones in 2012, 2013, 2014,
22 where Mr. Greebel is talking about his relationship with
23 Retrophin. And the comp memos are not viewed in a vacuum.
24 They're also viewed in connection with Mr. Greebel's time
25 sheets, which show that he was the principle timekeeper for

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1 Retrophin, which means that he gets credit not only for the
2 hours that he works, but for all the other hours that all the
3 other lawyers work on that matter. And that his number one
4 client, both for himself and for everything else, was
5 Retrophin by a mile.

6 And, you know, I haven't looked at those stats
7 recently, but I believe it's significantly -- the most work
8 that's being done, the most number of hours that are
9 attributed to him, by far, is Retrophin. And that was a
10 change from prior years where he did not have a client in that
11 way.

12 And the comp memo asks for more money based, in
13 part, on his success with Retrophin. And the numbers
14 themselves are very significant.

15 So in the 2010, 2011, 2012, he's in the \$300,000
16 range for salary. In 2014, the comp memo in 2014, which looks
17 back on the time period of the Fearnow shares, the settlement
18 agreements, the consulting agreements, when Retrophin is kind
19 of becoming this major client for him, his billables shoot up.
20 His compensation shoots up to \$900,000. In fact, he's the
21 number one income partner at Katten that year, based, in large
22 part, on his work for Retrophin.

23 What happens, it then goes down in 2015, because
24 they're unable to collect from Retrophin after Retrophin fires
25 Katten, and it goes back down to \$400,000. So those numbers

1 alone show you how significant this client was to Mr. Greebel.
2 And we'll, obviously, have a live witness to explain the comp
3 pieces of this and, they're obviously available to
4 cross-examine that person on, you know, the percentages and
5 that he had other clients. I believe he had the Winklevoss
6 brothers at one time --

7 THE COURT: The Bitcoin twins.

8 MS. SMITH: The twins, exactly.

9 And so this just shows it's this incredible motive.
10 I mean, he more than doubled his salary in a year, based on
11 the fact that this client was becoming this huge generator of
12 money for Katten. I mean, across all of the different, you
13 know, all the different areas that Katten was doing work, they
14 billed \$6.3 million to Retrophin.

15 This is a significant motive for Mr. Greebel. It's,
16 like I said, more than doubling his salary. It's giving him
17 prestige in the sense that he now has this major client that's
18 producing for the firm. And we think it's directly tied to
19 his motive to something crimes.

20 What he's doing in December, January of 2012, is
21 keeping Retrophin afloat so that it can be a client for him in
22 the future. That's why the money is important, so that he
23 can, you know, keep his job, frankly, because as we'll show,
24 Retrophin owed -- Retrophin and MSMB owed over a million
25 dollars in that time period. And it's a motive for him to

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1 participate to keep Mr. Shkreli and Retrophin afloat so that
2 he can benefit from them in the future.

3 And all of those arguments about, you know, that he
4 was billing other people and these other factors, those are
5 jury arguments. You can argue that that, is not, in fact, a
6 motive, because it didn't matter that much to Mr. Greebel.
7 But I think that the numbers very clearly show otherwise.

8

9 (Continued on following page.)

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1 MR. BRODSKY: Your Honor, I'm sorry.

2 THE COURT: Would you consider submitting evidence
3 without reference to the actual number by saying in this given
4 year he was the highest billing partner by such-and-such
5 percent or are you stating it's important for the jury to hear
6 the actual number that he was compensated?

7 MS. SMITH: I think it's important to hear the
8 actual numbers because I think they are tied to exactly the
9 number of billables, and you can see that it moves
10 significantly from one year to the next. I mean, it goes back
11 down again and I'm sure they are going to have an argument
12 about that, but I do think they're significant.

13 There was also a comment about the bills that
14 Retrophin received. That's incredibly significant. There are
15 line items in those bills that describe the work that
16 different attorneys were doing. There were periods where
17 there was very little billing and there is a lot of illegal
18 activity going on. So those bills and the invoices that show
19 what is being worked on at what time is really significant,
20 the amount of time that is being billed is really, really
21 significant. I mean as you know, that was part of the concern
22 on the board members that the bills were very high and they
23 felt that Mr. Greebel was not kind of paying attention to the
24 board or really supporting Mr. Shkreli. I mean I think that
25 there is no question that the bills are relevant and

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1 admissible to show everything that was going on between Katten
2 and Retrophin.

3 But I do think that the numbers are important
4 because I do think that it shows in a lot of detail how the
5 correlation between this enormous client coming up and these
6 millions of dollars being billed and the impact on the salary.

7 MR. BRODSKY: Your Honor, very respectfully.

8 THE COURT: Okay, it has to be short, Mr. Brodsky.

9 MR. BRODSKY: Very short, Your Honor, a few points.
10 One, they are going to submit in the invoices and
11 the bills.

12 THE COURT: I beg your pardon?

13 MR. BRODSKY: They are going to submit the invoices
14 and the bills. If they don't, we will. The invoices and the
15 bills will show the amount of hours worked; fine. The
16 invoices and the bills will show that he is working on various
17 days; fine. They want to argue to the jury based on the
18 invoices without the dollar amounts this was a big client;
19 fine. They want to elicit that it was a big client of the
20 firm, they can go ahead and do that. They can actually
21 elicit, if they want, they said that what they wanted to do is
22 show that it was a major client producing for the firm and a
23 lot of attorneys were working on it. They have all of that.
24 The invoices will reflect that. They can have witness
25 testimony.

1 But most respectfully, Your Honor, it is simply not
2 true that the income partner bonus, the salary and bonus --
3 the salary was already determined, but the bonus was
4 correlative of Retrophin. And I believe they know that to be
5 true.

6 We are willing to put, Your Honor, before they allow
7 any of this evidence in, put on the income partner committee
8 Mr. Silverman who they spoke to. Let him tell you, Your
9 Honor, outside the presence of the jury that it was holistic,
10 that it didn't involve any particular formula, because we are
11 100 percent confident that it's true.

12 THE COURT: Even if the firm does not necessarily
13 agree with Mr. Greebel's compensation memo in which he pitches
14 why he should receive certain compensation, even if they do
15 not agree, that is actually less relevant than Mr. Greebel's
16 perception of why he should be compensated at a certain amount
17 and what work he did and why he thinks certain clients warrant
18 his compensation. So --

19 MR. BRODSKY: It is the numbers --

20 THE COURT: -- it is the numbers that he seeks and
21 the numbers that he uses in terms of his billings, his
22 receipts, the amount of money that he brings in from
23 particular clients or from particular efforts that go to
24 Mr. Greebel's, arguably, state of mind. And it seems to me
25 that the motive, which is what the Government is proffering

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1 this evidence for, is part of its case. It is relevant, and
2 whether or not arguments can be made after you cross-examine
3 the partners who are going to testify to explain the
4 compensation, I think the jury is entitled to weigh that
5 evidence, but it does not mean it is excludable. I think it
6 is relevant --

7 MR. BRODSKY: Well, I would point to --

8 THE COURT: -- according to the cases cited by the
9 Government.

10 MR. BRODSKY: Well, the cases cited by the
11 Government are, for example, the Quattrone case, which is
12 completely distinguishable, I would direct Your Honor to Stahl
13 and Ferguson, which I think set the standard, but if you look
14 at the compensation memo, for example, for 2014, February 7,
15 2014, Mr. Greebel was talking about, you know, one of the most
16 significant things, which is the firm's virtual currency
17 practice. You referred to the Winklevoss twins, that was a
18 significant part. So if a memo like this is going to come in,
19 we are going to have a lot of talk and evidence and discussion
20 and witnesses about who all his clients are, what other work
21 is being done. And to me, what is that relevant? Does it
22 make a fact more likely or less likely? And the prejudicial
23 value is extremely high.

24 Does this suggest that every partner in every law
25 firm, simply because they have a compensation salary and a

1 bonus based on a multitude of factors, is motivated to commit
2 a crime with their client? It just seems so attenuated. It
3 just suggests, just like Judge Droney found with respect to
4 Mr. Milton's compensation and bonus, that there is not a
5 direct tie. Had this been a law firm and there are law firms,
6 Your Honor, which are known as eat what you kill. You bring
7 in \$10 million, you are going to get 33 percent. You bring in
8 this number -- it's formulaic. And what the Government's
9 evidence presented through Mr. Silverman, what those
10 statistics show is it's not that.

11 And this is such prejudicial evidence, Your Honor,
12 that it will distract and overwhelm the jury from actual
13 evidence. They can get in 98 percent of it. They can get in
14 his time. They can get in what work he is doing. They can
15 get in the number of lawyers working on the matter. Why do
16 they need to get in the actual dollar amount, which, by the
17 way, is larger for fiscal year 2010 as a base salary than it
18 is later. It just seems like you can move these statistics in
19 so many ways and the numbers are inherently prejudicial.
20 That's what we object to.

21 THE COURT: I think it is common knowledge that
22 lawyers at a law firm like Katten are highly compensated, and
23 I do not think that in New York this would be particularly
24 shocking or prejudicial to a jury. It seems to me that the
25 Government proffers this evidence as probative of

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1 Mr. Greebel's mindset, in terms of why he perceived Retrophin
2 and MSMB and its CEO, Mr. Shkreli, to be a very important
3 client and, according to the Government's theory, a reason why
4 Mr. Greebel may have, as the Government charges, gotten
5 involved in a conspiracy to defraud one of Mr. Greebel's
6 clients, Retrophin.

7 Respectfully, I am going to overrule that motion and
8 rule that Mr. Greebel's compensation is relevant evidence and
9 you are free to cross-examine --

10 MR. BRODSKY: Understood, Your Honor.

11 THE COURT: -- and make any arguments that you would
12 like.

13 What else is important? Because I am hoping we can
14 finish up here.

15 MR. BRODSKY: Thank you, Your Honor. Thank you for
16 your patience. I appreciate it.

17 If I had to highlight in the press of time what was
18 extremely important, I would say that --

19 THE COURT: I mean there are certain things that I
20 can tell you I am going to reserve on just so we can cut
21 through it.

22 MR. BRODSKY: Sure, that would be helpful.

23 THE COURT: Item Q-1, I think what we have to do is
24 we --

25 MS. SMITH: Your Honor, I'm sorry, we don't have the

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1 chart. Can you just tell us what --

2 MR. BRODSKY: We did produce the chart to them.

3 THE COURT: They don't have it with them.

4 I think that the defense should specify what
5 evidence it specifically wishes to preclude. It is something
6 that I cannot decide given what you have briefed, so I think
7 that we should reserve on that.

8 On the motion to preclude certain inadmissible
9 testimony and expert testimony by Mr. Greebel, to preclude
10 exhibits and testimony by Mr. Pierotti, I think that he did
11 make some, I thought, gratuitous comments and unsolicited
12 comments in response to the Government's direct and I am sure
13 that is one of these witnesses that may be difficult to
14 control and guide. I would not allow him or I would caution
15 the parties in having Mr. Pierotti offer statements and
16 editorial comments, as he did from time to time in the other
17 trial.

18 I do not find any reason to exclude Ms. Oremland's
19 testimony. I thought that she was appropriate. She testified
20 to an area that I think was helpful to the fact-finders,
21 whether or not she was designated an expert or not, but I am
22 not going to preclude her testimony.

23 We have the Government's motion to admit and later
24 identify Mr. Greebel's post-arrest statements and preclude him
25 from introducing additional post-arrest statements.

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1 Have you come any closer to that, deciding or
2 agreeing?

3 MS. SMITH: Your Honor, I believe, and this was
4 something that we were going to raise, the defense made a
5 filing that they didn't file publicly on Wednesday and just
6 delivered to your chambers. I'm not sure whether you received
7 it. It is the chart. It is like a Rule 106, the same thing
8 we did in the Shkreli trial with the statements.

9 We had said that we would respond by Monday. We are
10 happy to go through the chart now without actually responding.
11 I don't know if you are prepared to do that. We can put in a
12 brief filing on Monday to respond.

13 THE COURT: I mean are you planning to agree to
14 anything here?

15 MS. SMITH: No, we did have a discussion and this
16 was the outcome. So we will just put in that brief on Monday.

17 The one thing I will say is the defense did not file
18 it on ECF. We don't agree with that. There's a chart of
19 statements that's attached to the motion, and what we did in
20 the last trial is we just didn't file the chart publicly, but
21 the kind of argument of why statements come in or don't come
22 in was filed publicly. I don't know that there is any
23 justification for keeping this briefing under seal.

24 So I just wanted to just raise that issue. We are
25 happy to not file the chart and statements publicly on the

1 idea that the press might pick up the specific post-arrest
2 statements or publish them prior to jury selection, which I
3 think is the concern, but I don't know that there is that same
4 concern about the brief itself. But I just wanted to clarify
5 that before we file on Monday.

6 MR. BRODSKY: This was the one, Your Honor, where
7 there was a deadline, and I understand Your Honor and the
8 Government didn't meet the motion deadline and then they
9 provided us with notice in September of -- they moved to delay
10 the notice to us of their post-arrest statements that they
11 wanted to admit.

12 In September they gave us the post-arrest
13 statements. We evaluated them. We agreed to a briefing
14 schedule. And what I would say to it, Your Honor, is we are
15 happy to file this publicly once the jury is impaneled and in.
16 What we don't want to do, certainly between now -- nobody
17 writes about our legal arguments, but when you write about any
18 kind of statement that somebody made or somebody else made, it
19 may create publicity and articles and we are trying to avoid
20 that in advance of jury selection.

21 And so we are happy to file all of these. Our
22 motion, which it comments on, quotes and cites, parts of the
23 attached statements, so it defeats the purpose to file the
24 motion but not file the attachment. We will file it all
25 publicly once the jury is impaneled. That's our request.

1 Obviously, if you direct us to file it, we'll file the whole
2 thing publicly.

3 THE COURT: All right, I do want to address this
4 whole issue of late filings because it seems to me that the
5 parties have blown my deadlines that I set forth in the
6 pretrial orders, and I am just not sure this is something that
7 could not have and should not have been brought up when,
8 according to the deadlines, this is not news or evidence that
9 was not available before.

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11 (Continued on next page.)

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1 (Continuing)

2 THE COURT: I do think that it is difficult.
3 Really, we are so close to trial, really, one week away, in
4 effect. Since it is now so late, but I am not sure whether I
5 will think about just rejecting the outright motions that were
6 filed beyond the time.

7 But I am happy to consider your response just in
8 case I decide to go ahead and consider it.

9 MR. BRODSKY: Your Honor, I just want to respond to
10 that. It is the Government that didn't meet the deadline in
11 producing the statements. We moved to preclude. We filed a
12 motion which is in E-1 of our chart, which moved to preclude
13 the admission of certain statements.

14 The Government filed a motion, which we opposed,
15 which said that they were going to -- and I will find the
16 motion. The Government filed a motion that said we want to
17 identify the post-arrest statements after the deadline.
18 That's the motion they filed on the deadline. They said that
19 they would produce -- and I can't find it at this very
20 moment -- but that's on R-1.

21 The Government moved to offer Mr. Greebel's
22 post-arrest statements in R-1, docket 329, on the deadline.
23 We filed a response in opposition and said you didn't meet the
24 deadline, so you shouldn't be able to admit any post-arrest
25 statements.

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1 It is then, despite our opposition and their reply
2 to that. We respectfully believe they should have given us
3 the post-arrest statements they wanted, so we could meet this
4 deadline. And so I don't want you to harm us --

5 THE COURT: I am not blaming anybody. I am just
6 saying that in response to this, you, yourself, made a
7 cross-motion; right?

8 MR. BRODSKY: We made a motion to preclude them from
9 introducing post-arrest statements because they did not meet
10 the deadline in identifying for us what they were, so that we
11 could file a motion before Your Honor. So it wouldn't have to
12 be briefed the week before.

13 THE COURT: All right.

14 What I am trying to get to are the motions that
15 really, absolutely, need to be decided before we start this
16 trial because --

17 MR. BRODSKY: Understood, Your Honor.

18 If there was --

19 THE COURT: This was filed October 3rd. I mean, you
20 know, your papers here -- and I am just concerned about how
21 much more I am supposed to consider. I am not blaming you. I
22 am accepting your statement that the Government did not give
23 you information that you needed to make the motion until late.

24 But I just, again, I am not going to continue
25 indulging this by either side.

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1 MR. BRODSKY: Understood, Your Honor.

2 If I had to identify another motion, I would say
3 that we believe in K-1, which is our motion on personal
4 liability of MSMB losses. We move to preclude the Government
5 from opening on and arguing to the jury that Mr. Shkreli had
6 personal liability for MSMB losses, without completing the
7 sentence, which is without telling them that he only had
8 personal liability if there were proof of fraud.

9 And to the Government, they have a footnote 18 in
10 their responsive brief, which I think is in tab L-2, Docket
11 Number 346. In footnote 18 they say it doesn't really matter
12 whether they tell the Government -- whether they tell the jury
13 that there's personal liability for Mr. Greebel for MSMB
14 losses, because there is or because of fraud. And to us it
15 does matter.

16 And the reality is the truth is under the PPMs and
17 under Delaware law, it's very clear that Mr. Shkreli was only
18 going to be personally liable for MSMB losses if there was
19 proof of fraud. Now, that's important to us, and it's
20 important for us to be accurate before the jury. And that's
21 our request there. And I think you can see our arguments on
22 that there.

23 If I had to point out another one that we'd ask you
24 to address, is it would be our motion requesting that either
25 you review in camera, or see the Grand Jury subpoenas that

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1 were issued by the Government after the superseding indictment
2 on or about June 3rd, 2016.

3 We filed a motion. We gave an example of one that
4 they issued to Retrophin, which was for the predominant
5 purpose of getting discovery. We understand the Grand Jury
6 process is uniquely in the control of the Court, and it's
7 under the Court's supervision.

8 We laid out the case law as to why we believe when
9 there's a predominant purpose for a Grand Jury subpoena, which
10 is really to get discovery for a trial, that that's not
11 appropriate. And we ask for copies ourselves, but in an
12 effort to try to expedite, we would just like Your Honor to
13 review them.

14 THE COURT: All right. I do not know who -- which
15 of the AUSAs is the most well-versed in this -- on these
16 Grand Jury subpoenas. But I think that there had been
17 previous representations made to the Court that the subpoenas
18 were part of an ongoing investigation, and were not being
19 issued to obtain further information relevant to this case.

20 I will hear from the Government. Maybe you know the
21 answer. I do not know if it is Ms. Smith that is going to
22 be --

23 MR. PITLUCK: No, Your Honor, those representations
24 are accurate.

25 THE COURT: All right. I mean, there is a

1 presumption of regularity unless the Defense comes forward and
2 shows me why I should doubt the Government's representation
3 that they served these subpoenas as part of a separate ongoing
4 investigation.

5 MR. BRODSKY: We put in our motion papers. The
6 Grand Jury subpoena that we did receive from the Government
7 that they issued after the indictment, it was earlier this
8 year. The sole request in the Grand Jury subpoena was to get
9 Mr. Rosenfeld's arbitration materials.

10 And with all respect to the Government, they had
11 already spoken to Mr. Rosenfeld. They had already given all
12 information about Mr. Rosenfeld prior to indictment.

13 And then in January of this year, they sent a
14 Grand Jury subpoena to Retrophin -- Grand Jury, not trial --
15 seeking all the -- to whether it was to Retrophin or to
16 Mr. Rosenfeld, I think it was to Retrophin, Dr. Rosenfeld, and
17 they got all Dr. Rosenfeld's arbitration materials.

18 And so that is the evidence of potential
19 irregularity that we point to, Your Honor, in our motion
20 paperwork. We find it -- that there's no basis, other than
21 for preparation of trial, to have that Grand Jury subpoena.
22 We also note in our motion paperwork the statements the
23 Government made in June, prior to the superseding indictment,
24 where they told Your Honor there will be no more defendants,
25 there will be no more superseders.

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1 And so with all respect, Your Honor, all we're
2 asking for, we're not asking for copies now, we're asking for
3 Your Honor to review them and make your own independent
4 determination, because it is the unique role of the Court to
5 supervise the Grand Jury process.

6 MR. PITLUCK: Your Honor, that's just patently based
7 upon speculation and nothing more. We continue to stand by
8 our representations that those Grand Jury subpoenas were
9 issued properly and for proper purposes. They were issued as
10 part of a separate but related investigation. They are not
11 used to gain evidence for trial.

12 There is simply nothing but rank speculation and,
13 Your Honor, there is no basis to order those productions.

14 THE COURT: Well, can you explain his point about
15 the Rosenfeld investigation?

16 MR. PITLUCK: I can, Your Honor. We would prefer to
17 do it ex parte and under seal, because it is an active
18 investigation.

19 THE COURT: Right.

20 MR. PITLUCK: But we can certainly write you a very
21 brief letter explaining that and it will on abundantly clear.

22 THE COURT: Okay. All right.

23 The argument that Mr. Brodsky made in his motion to
24 preclude the Government from asserting that Mr. Shkreli had
25 personal liability for the MSMB losses. I think that the

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1 memoranda, the private placement memoranda, did allow for
2 personal liability of a general partner for gross negligence,
3 willful misconduct or willful breach of the partnership
4 agreement.

5 And I think that, in addition, I am not sure that is
6 an issue so much under Delaware law as it is the agreements
7 that he proffered to potential MSMB investors.

8 MR. BRODSKY: Those were the PPMs.

9 THE COURT: Yes.

10 MR. BRODSKY: The private placement memos that he
11 gave to --

12 THE COURT: And it did clearly specify that there is
13 personal liability. This is the MSMB Capital Management
14 private placement memos and at page 21 it specifies the
15 conditions under which a general partner could be liable for
16 losses.

17 MR. BRODSKY: Understood, Your Honor.

18 And all we would ask is that they accurately say
19 that their personal liabilities of Mr. Shkreli, they
20 accurately quote what the PPMs require, and that is, that
21 there has to be some gross negligence, fraud, or the other
22 item Your Honor mentioned.

23 THE COURT: All right. Willful misconduct.

24 MR. BRODSKY: Willful misconduct.

25 MR. KESSLER: I'm sorry, Your Honor. Is that a

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1 ruling or was that?

2 THE COURT: Well, he is asking me to order that if
3 you are going to allege that Mr. Shkreli is personally liable
4 for the MSMB losses, that you indicate that by reference to
5 the PPM for the MSMB Capital offering memorandum.

6 MR. KESSLER: Your Honor, with respect, we're not
7 misrepresenting his liability if we say he's personally
8 liable, and there's no legal authority that's been cited in
9 court that says that defense gets to edit the Government's
10 arguments to make them what they believe to be more legally
11 accurate.

12 THE COURT: It is an argument which you can point
13 out; right? You can point out.

14 It is not that it is inadmissible. It is just an
15 argument that you are going to make to the jury as to the
16 conditions under which the general partner could be found
17 liable. Here, Mr. Shkreli, personally liable. So it does not
18 -- it should not be precluded.

19 MR. BRODSKY: I'm not trying to preclude it,
20 Your Honor. But I think if the Government misstates a fact
21 that's in evidence, which if the PPMs come into evidence and
22 they misstate the fact, it's objectionable.

23 So if they sum up and they want to say it's personal
24 liability, and they stop there, I think it's misleading the
25 jury and it's objectionable. I think we're duty-bound to

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1 object if the Government is going to mislead the jury.

2 And all I'm suggesting is I know Your Honor has the
3 authority to direct them to be accurate in their statement.

4 If you make an argument to the jury, which is not
5 based on the evidence, which is totally misleading to the
6 jury, it's certainly within your province, Your Honor, both to
7 us and to the Government, to ensure that we don't do that.

8 MR. KESSLER: Your Honor, it is the position of the
9 defendant that Mr. Shkreli, in fact, committed fraud. They
10 have talked all about his frauds and his lies. So this all
11 just seems to be an effort to hamstring us by making us add
12 words to things we might say.

13 THE COURT: No. I think, at this point, I am going
14 to wait and hear what the statements are and whether it draws
15 an objection, and what ruling I will make at that point. But
16 it does seem to me that a lot of this is about arguments that
17 the parties are able to make, and I am not going to preclude
18 or direct statements at this time.

19 Is there anything else, because, honestly, I am way
20 overdue for something that I should have been out an hour ago,
21 but I am happy to hear from you.

22 MR. BRODSKY: No. We will submit the rest of our
23 arguments on its papers. I know a lot of that can be properly
24 reserved for the evidence at trial.

25 We put in motions with respect to particular lay

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1 opinion testimony we think is inadmissible. We wanted to
2 address as much as we could in advance of the trial, in
3 advance of witness testimony.

4 MR. KESSLER: Your Honor --

5 THE COURT: Yes.

6 MR. KESSLER: -- we have one additional brief issue,
7 and then there may be some housekeeping.

8 THE COURT: Yes.

9 MR. KESSLER: Not on the motions. We're happy to
10 rest on the papers.

11 We had filed a motion about Rule 16 discovery at one
12 of the motions.

13 THE COURT: The experts?

14 MR. KESSLER: No, no. Just early on that the
15 defendant had to produce the exhibits that he needs to use in
16 his case in chief.

17 The defendant produced hundreds of thousands of
18 pages as potential exhibits more than a month ago. There was
19 no metadata in any of the documents, including documents that
20 we had produced to defendant with metadata. So it had all
21 been surfed out. We asked for an explanation. Haven't gotten
22 one yet.

23 But more important, Your Honor, and this is the
24 think we're bringing up. The defendant ultimately identified
25 to us a list of Bates numbers, that were sort of randomly

1 scattered through the production, that the defendant
2 represented had not been produced by the Government to the
3 defendant. That is, these were documents the defendant
4 intended to use in his case-in-chief that had not -- had come
5 from some other source other than the Government.

6 We asked what was the source. The defendant first
7 said they would think about it. I believe then they asked us
8 what our authority was to note the source. Then they said
9 they would research it. Still don't have an answer and --

10 MR. BRODSKY: Your Honor, I can moot the whole thing
11 because I know that time is short.

12 We told them in a letter this week. We sent it two
13 days ago. We are going to narrow our trial exhibits for them.
14 They will have metadata for all of it.

15 THE COURT: Okay. Let's put a date on it, shall we?

16 MR. BRODSKY: Yes.

17 THE COURT: How about on Tuesday?

18 MR. BRODSKY: Yes.

19 MS. SMITH: Your Honor, we're supposed to get trial
20 Exhibits today. We have ours, actually. We have our trial
21 Exhibits and some supplemental 3500 from this week, and we
22 expected get the defendant's Exhibits today too.

23 MR. KESSLER: Our Exhibits are all in the back.

24 MS. SMITH: And our Exhibits are in the back for
25 Your Honor. They were due on the 3rd. We agreed we would

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1 exchange them on the 6th at the Pre-Trial Conference --

2 MR. BRODSKY: Let me ask our people when we think we
3 can get it done.

4 MS. SMITH: We were going to talk about off-loading
5 those for you.

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7 (Continued on following page.)

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1 MR. BRODSKY: Your Honor, we have our list. We can
2 provide an electronic copy. We did have our list ready today
3 for the trial exhibits. We have it ready for them. We are
4 happy to give it electronically with the metadata.

5 MS. SMITH: When are we going to get the electronic
6 exhibits?

7 MR. BRODSKY: First thing tomorrow.

8 MR. KESSLER: Your Honor, I don't think the source
9 question is resolved.

10 MR. BRODSKY: Because the metadata will be there.
11 We will give you the source material.

12 MR. KESSLER: All we are asking for is for the list
13 of documents that come from someone other than the Government,
14 that the defendant do what we have done in every production in
15 all of these cases, which is next to the Bates number, we just
16 put the source.

17 THE COURT: Tomorrow you will provide that, all of
18 that information, Mr. Brodsky.

19 MR. BRODSKY: Correct.

20 MS. SMITH: Your Honor, just one other issue I want
21 to raise related to this. The documents that were produced to
22 us as the new documents, a lot of them are e-mails from Mr.
23 Greebel. They were not produced, as far as we can tell, by
24 Katten or by Retrophin. I don't know -- I guess we are going
25 to find out the source of them tomorrow. The problem is

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1 because they didn't come from Katten or Retrophin but a lot of
2 them are Retrophin documents, there appear to be documents
3 that were produced to us that are, in fact, privileged, where
4 Retrophin has not yet waived the privilege and I do not want
5 to be in a situation at trial where either they are trying to
6 introduce an exhibit or there is something being used on cross
7 where we have a question about whether it is within or not
8 within the scope of the Retrophin privilege waiver. I just
9 want to raise that issue.

10 I don't know if they are going to be work with
11 Retrophin on their trial exhibits. There are a lot of
12 e-mails. Some of them seem to be bcc'ed to Mr. Greebel's
13 personal account but they're actually Retrophin's e-mails.
14 When they were produced to us, we have confirmed at least some
15 of them, the privilege has not yet been waived. I don't want
16 it to be an issue at trial.

17 MR. DENERSTEIN: Respectfully, I do believe that
18 that issue has been mooted by our exhibit list which should
19 substantially reduce from the \$3 million documents that were
20 produced to us.

21 THE COURT: Has Katten agreed that these documents
22 can be used?

23 MS. SMITH: Retrophin.

24 THE COURT: I am sorry, Retrophin.

25 MS. SMITH: I'm just talking about the new

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1 documents. Obviously anything that was produced by Katten or
2 Retrophin after all of that negotiation is fine because we
3 wouldn't have gotten them otherwise.

4 MR. BRODSKY: Your Honor, we produced a very large
5 initial exhibit list on a hard drive. We have reduced it so
6 much that I don't believe there is going to be any question
7 that the documents on here will be acceptable to Katten, will
8 be acceptable to Retrophin in terms of within the privilege.
9 And if there is an issue with their review of this narrowed
10 list, then they can raise it.

11 THE COURT: Who? Katten?

12 MR. BRODSKY: No. I'm sorry. I don't believe there
13 will be an issue with Katten.

14 MS. SMITH: It is actually Retrophin's privilege.

15 THE COURT: It is.

16 MR. BRODSKY: Or Retrophin.

17 THE COURT: But they are defending Retrophin's
18 privilege.

19 MS. SMITH: Right.

20 THE COURT: As is the Cooley lawyer.

21 MS. SMITH: Cooley is the one defending. I wanted
22 to raise that. That came up in the last trial as well. We
23 want to make sure we are not having that issue in the middle
24 of trial.

25 THE COURT: So make sure that you have clearance

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1 from Retrophin --

2 MR. BRODSKY: Yes, Your Honor.

3 THE COURT: -- on the documents that you expect to
4 admit.

5 MR. BRODSKY: Understood, Your Honor. And we are
6 talking to Retrophin's outside counsel about documents and
7 what comes within privilege and without privilege. We are
8 asking them at times to expand what they have their waivers of
9 prior privilege. So we are in discussion with them, Your
10 Honor.

11 THE COURT: All right.

12 MR. DENERSTEIN: Your Honor, may I raise a
13 housekeeping issue?

14 THE COURT: Yes.

15 MR. DENERSTEIN: It is not related to the motion.
16 At this point, as Your Honor points out, we are a week away
17 from trial. The Government presents its case in-chief and
18 then obviously the defense will decide whether to present a
19 case in-chief or not. But it would be extremely helpful,
20 important and crucial to get a meaningful list of witnesses
21 from the Government. I know in the last trial they agreed to
22 provide who they were calling the first week of trial in
23 advance. That would also be extremely important to us. We
24 would hope that they would extend the same courtesy to us so
25 that we can properly prepare.

1 Today we are just learning that certain witnesses --
2 and I'm not casting aspersions -- that were in the past trial
3 may not be in this trial. And, you know, just, in addition,
4 last night, they produced 2,000 documents related to Sara
5 Hassan. Obviously, if she's a witness in the first week, we'd
6 like to know. We do want a fair trial and we want to proceed
7 in an efficient manner and we respectfully ask the Government
8 to help us with this.

9 MS. SMITH: We have a revised witness list. I know
10 that Ms. Williams asked both parties to provide a revised
11 witness list. We have ours here. We expect there to be one
12 from the defense as well.

13 And just to be clear, I do want to clarify that the
14 Sara Hassan documents, most of them we believe are duplicates.
15 1,000 pages of that is a book that Mr. Shkreli sent to Ms.
16 Hassan which had already been produced. But just so that you
17 know, most of that production is that book, apparently. But
18 we have our revised witness list. We will provide it now and
19 we expect one to receive one in return. The last witness list
20 that we got from the defense had 364 fact witnesses on it.

21 MR. BRODSKY: The Government's witness list had 89.
22 We weren't sure what the Government was doing.

23 THE COURT: You are going to give them a witness
24 list. What is the date by which you can do that? Let's have
25 a date by which you are going to provide the witness list.

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1 MR. DENERSTEIN: Monday.

2 Your Honor, there was a second part to my request
3 which I don't believe Ms. Smith responded to, which is just
4 the first week's witnesses.

5 MS. SMITH: Some time next week we will be able to
6 give them. By Wednesday of next week --

7 THE COURT: Would you let us know as well?

8 MS. SMITH: Yes, I will.

9 -- who we anticipate calling in the first week. It
10 may change. I do think the jury questionnaire is going to add
11 time and we have witnesses with travel --

12 THE COURT: Adjust the order that you are going to
13 call the witnesses in.

14 MR. DENERSTEIN: Is there a way we can get that
15 sooner than Wednesday? That's very little time and I know
16 that you said you think the documents are duplicate, but we
17 will obviously have to spend time figuring out whether the
18 thousand documents are duplicates or not.

19 MS. SMITH: It is 2,000 pages, not 2,000 documents.

20 MR. DENERSTEIN: But still, if thousand of it is a
21 book, that leaves another thousand to go through.

22 MS. SMITH: I believe most of it are duplicates. We
23 will try and do it before Wednesday. I'm telling you we are
24 having a bunch of travel discussions with people. Also, we
25 were waiting until today to see how the rulings went too in

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1 terms of our case. We can try to do it before Wednesday, but
2 we will certainly do it by Wednesday. It was our
3 understanding that we weren't going to be opening until the
4 18th; is that right?

5 THE COURT: Yes. Hopefully we have the jury
6 selected by that date.

7 MR. BRODSKY: Your Honor, what day would you like us
8 to come to an agreement with the Government? There are just
9 two additional questions or one that we have to add for Mr.
10 Greebel. On Monday, can we get that to you by?

11 THE COURT: Monday is fine.

12 What I would suggest you do is agree on a form
13 questionnaire, then the Government or the defense will arrange
14 to put the numbers up to 300 on them. We really have called
15 200 in. Should we call more?

16 MR. DUBIN: We think so.

17 MS. SMITH: I think so.

18 THE COURT: We will try to get more jurors, but I
19 can't promise. Usually what we do is we recycle jurors from
20 other cases. Hopefully there will be enough. We were able to
21 manage the first day in the other trial, so hopefully we can
22 do that.

23 MS. SMITH: Your Honor, we wanted to also, the
24 sitting schedule, I believe November 10th is Veterans day.

25 THE COURT: Yes.

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1 MS. SMITH: I wanted to confirm that we are not --

2 THE COURT: Let me give you some guidance on that.

3 We will sit the full week of October 16th. The following week
4 of October 23rd, I, unfortunately, have an obligation where I
5 am not going to be able to sit on Friday. So I am not sitting
6 the 26th and 27th. I apologize for that.

7 Also, I thought we had a three-week trial. For some
8 reason, now we are at five.

9 The week after that, on November 3rd, I will not be
10 sitting, Friday. November 10th is Veterans day, so I will not
11 be sitting.

12 I am going to sit during Thanksgiving week, except
13 for Thursday and Friday. We will sit Monday, Tuesday and
14 Wednesday. And if we were still going by the week of November
15 27th, I will not be sitting the 30th and the 1st of December.
16 And we will be finished by December 4th, won't we?

17 MR. BRODSKY: We do hope so, Your Honor.

18 THE COURT: I don't have how this grew into a
19 five-week trial with two counts when we had eight counts in
20 the other case and we got it done in six weeks.

21 MS. SMITH: Your Honor, we had said the Government
22 expects its case to be three weeks instead of five weeks.
23 Defense counsel said, at least they represented to us, that
24 their defense case may be five to seven trial days, but they
25 don't know, which is fine. But then given that, we need to

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1 account for deliberations. I just don't want to tell the jury
2 less time --

3 THE COURT: Right.

4 MS. SMITH: -- and then have them stay longer.
5 That's where the math comes from.

6 THE COURT: We will tell them five weeks. Is that
7 acceptable to everybody?

8 MR. BRODSKY: Your Honor, it's acceptable. We had
9 suggested to the Government we inform the jury four weeks. We
10 defer to Your Honor and we are happy to do five.

11 THE COURT: I just don't want them to be lulled into
12 a false sense this will be over. Plus, since I am not sitting
13 on those days.

14 MS. SMITH: Yes, we had expected full trial weeks.

15 THE COURT: This is a little different from the
16 other trial. I just have other obligations.

17 MR. BRODSKY: I would like to say, Your Honor, just
18 to make sure in connection with what you tell the jury, we are
19 not making a decision today we are definitely going to put on
20 a case in-chief, so we do reserve the right --

21 THE COURT: No, I am not going to tell them anything
22 about what you are going to do. In fact, we will be clear
23 that you don't have to do anything, that is not your
24 obligation.

25 MR. BRODSKY: Thank you.

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1 MR. DENERSTEIN: Your Honor, if I may raise one more
2 housekeeping matter, we had sent the Government a letter
3 yesterday about 3500 material because some of it is in
4 decipherable because, for example, it refers to tab A, was a
5 problem with post-option pool.

6 MS. SMITH: Your Honor, there has been a lot of
7 stuff going back and forth. We are happy to provide what they
8 ask for in terms of clarifying some of the documents that are
9 referenced in the 3500.

10 MR. DENERSTEIN: And when would that be?

11 MS. SMITH: We can certainly do it this weekend.
12 Some of the documents you identified I think you have, but we
13 will make that clear.

14 MR. DENERSTEIN: Great.

15 MS. SMITH: I mean, I think you have all of the
16 documents. We will we provide Bates numbers.

17 MR. DENERSTEIN: All right.

18 THE COURT: I think I should try to zip through the
19 rest of these. I am sorry. I am very grateful to the Court
20 reporters for their indulgence.

21 Mr. Greebel made a motion to admit statements of the
22 Government regarding commingling between Retrophin and MSMB.
23 I think the best thing on this is to defer at least until the
24 defendant can convince me that they have no evidence to show
25 the commingling. I think there is evidence that doesn't

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1 require the admission of Government statements on this point.

2 MR. BRODSKY: Understood, Your Honor.

3 THE COURT: And then there is a motion to preclude
4 lay opinion testimony of Mr. Jackson Su, Steven Aselage, Corey
5 Massella, and Timothy Pierotti. Respectfully, I am going to
6 deny this motion because I believe the opinions of lay
7 witnesses is admissible generally under the rules on certain
8 issue of which they have personal knowledge and it would go to
9 the weight, not admissibility, and in addition, the defense is
10 free to argue that the Government has not laid an appropriate
11 foundation.

12 I am not prepared to bar the Government, as Greebel
13 moves, from presenting evidence regarding other conspirators
14 relative to Count Seven. As counsel are aware, the admission
15 of co-conspirators statements may be admissible subject to
16 connection. I would note that many of the witnesses whose
17 statements were admissible at the last trial are not agents of
18 Mr. Greebel's and there may not be ready admission of their
19 statements, so please be advised.

20

21 (Continued on next page.)

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23

24

25

1 (Continuing)

2 THE COURT: Mr. Greebel, wants to preclude argument
3 or evidence that outside auditors determined that settlement
4 agreements were improper. I do not think that that is what
5 the auditors said.

6 The auditors just noted that there was an
7 indemnification agreement between MSMB and Retrophin, and that
8 it was not clear whether MSMB would be able to pay the amounts
9 agreed to. And I believe the auditor also stated there was no
10 fraud or illegal acts noted.

11 So I think that the characterization of the
12 auditors' statement by Mr. Greebel are not accurate. I do not
13 know really how you were intending to frame this argument, but
14 there has not been an actual conclusion by the auditors that
15 those settlement agreements were improper. I think they just
16 noted it and wondered and asked questions about it.

17 MR. BRODSKY: The Government opened on that in
18 Mr. Shkreli's trial. In light of that, they never decided to
19 call Marcum in that case. They had been meeting with the
20 Marcum witnesses from the 3500 material. We were trying to
21 move to preclude them from opening on the fact that the
22 external auditors said they were improper. I think Your Honor
23 has answered that question with your analysis.

24 THE COURT: I do not think they have made that
25 statement, so.

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1 MR. KESSLER: I don't think there's a document in
2 which the auditors use the phrase "weren't proper." What we
3 were arguing in our response is that it's an argument or a
4 conclusion based on what they did find.

5 THE COURT: Yes. There were findings, but I do not
6 think they said it in a way that you characterized it,
7 frankly. So that is why I -- I think that the parties are
8 going to be governed by the evidence, both in their openings
9 and their closings.

10 MR. BRODSKY: Thank you, Your Honor.

11 THE COURT: There was a motion by Mr. Greebel to
12 preclude the Government from arguing that the Fearnow
13 recipients became affiliates by working for Retrophin and to
14 preclude admission of Government's Exhibit 242.

15 MR. BRODSKY: In light of the first part of that
16 motion is moot, because the Government said they wouldn't
17 argue the -- that Fearnow recipients became affiliates by
18 working for Retrophin. So the only two pending are our motion
19 to preclude the admission of Government's Exhibit 242, and the
20 in camera review of the legal instructions.

21 THE COURT: I think we touched on the Grand Jury
22 proceedings. I do not have, in my view, sufficient evidence
23 to require the Government or the Grand Jury to disclose
24 instructions that may have been provided to the Grand Jury.

25 There is a presumption of regularity in those

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1 proceedings, and it does not seem to me that that would be an
2 appropriate -- you know, if you came forward with something
3 else I would reconsider; but at this point, I am not prepared
4 to order a review of the legal instructions.

5 MR. BRODSKY: The other one was Government's
6 Exhibit 242, Your Honor. I don't know if you want to reserve
7 on that or you want --

8 THE COURT: I might reserve on that; all right?
9 Unless you wanted to offer argument.

10 MR. BRODSKY: We don't need to do it now,
11 Your Honor. That's why if you want to reserve, it's fine to
12 reserve for now.

13 THE COURT: Okay.

14 We ruled on Mr. Greebel's motion to preclude use of
15 discovery obtained by post-indictment Grand Jury subpoenas.
16 That has been an issue that I think is mooted by the
17 Government's representation that they did not serve any
18 Grand Jury subpoenas relevant to this indictment; but rather
19 have served subpoenas relevant to an ongoing investigation.

20 And I think you were going to make a in camera
21 proffer; is that right?

22 MR. PITLUCK: If you'd like, Your Honor.

23 THE COURT: I do not.

24 MR. PITLUCK: Quite frankly, I don't think it's
25 necessary. Our representation is firm and there is absolutely

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1 nothing to suggest otherwise, other than the mere fact that a
2 Grand Jury subpoena was issued.

3 THE COURT: All right.

4 The Government moves to offer Mr. Greebel's
5 post-arrest statements. I think that is an issue that should
6 be reserved. I do not know which statements are going to be
7 offered.

8 Did you want to offer all of the ones that were
9 attached?

10 MR. KESSLER: Your Honor, it's -- that question is
11 related to the motion that was put up earlier.

12 THE COURT: Okay.

13 MR. KESSLER: The 106 briefing.

14 THE COURT: All right.

15 So we are reserving on that. Okay.

16 There was another motion by the Government to
17 preclude Mr. Greebel from testifying about documents that he
18 reviewed after this case was indicted and any conclusions he
19 reached based on his review.

20 I do not know, really, what types of testimony you
21 would offer for Mr. Greebel on this. Should I reserve, or are
22 you prepared to tell me now?

23 MR. BRODSKY: Your Honor, this is extremely
24 premature to be discussing whether or not Mr. Greebel will
25 take the stand. And if he takes the stand, we just commit to

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1 you, Your Honor, every question -- in our good faith
2 representation, every question we ask will have a good faith
3 basis under the rules of evidence and every answer will be the
4 answer.

5 And to the extent that there is inadmissible
6 question or inadmissible testimony, Your Honor will be
7 overseeing the trial.

8 MR. KESSLER: Your Honor, the Government does not
9 believe there's a need for the Court to rule today.

10 THE COURT: Okay. Good.

11 MR. KESSLER: However, we do want to note that
12 Mr. Brodsky filed an affidavit in connection with the
13 severance motion --

14 THE COURT: Yes.

15 MR. KESSLER: -- when he described exactly the
16 questions he would ask Mr. Greebel, and the answers
17 Mr. Greebel would give.

18 THE COURT: Right.

19 MR. KESSLER: And it is just those specific
20 questions and answers we've addressed here.

21 So we do know from Mr. Brodsky's representation what
22 the questions and likely answers will be, on those four.

23 MR. BRODSKY: I was giving a summary very brief
24 summary, Your Honor, for the severance.

25 THE COURT: Okay.

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1 MR. BRODSKY: That is not the question and answer
2 form that we will use. We may use some of the same questions,
3 but they will --

4 THE COURT: You mean, you hoodwinked me into
5 severing the trial? No, I am kidding.

6 MR. BRODSKY: You are going to see evidence and you
7 are going to see argument that, you know, our faces would
8 light up if your Mr. Brafman and Mr. Agnifilo and Ms. Zellan,
9 they would be going a little bit wild by some of our
10 arguments. So I think the severance was appropriate.

11 THE COURT: All right. Next, the Government moves
12 to preclude Mr. Greebel from introducing evidence that
13 Mr. Shkreli lied to others, or arguing that such lies show
14 that Mr. Shkreli lied to him.

15 I think this sounds like propensity evidence and,
16 generally, as you know, that is not admissible. I would be
17 content if the parties are to reserve on this until I know
18 specifically what alleged lies were told by Mr. Greebel.

19 MR. KESSLER: Your Honor, we are happy with that
20 reservation with one exception.

21 THE COURT: Okay.

22 MR. KESSLER: If the defense opening is going to
23 make the argument that Mr. Shkreli lied to Greebel left and
24 right, and we are going to -- and talks about specific lies or
25 makes the propensity argument, then that is something we would

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1 like the Court to address before the opening. It doesn't have
2 to be today.

3 If that's not going to be an issue, then there's no
4 reason to address it before the opening.

5 MR. BRODSKY: I just heard Mr. Kessler say that if
6 the defense opens and says Mr. Shkreli lied to Mr. Greebel
7 that wouldn't be appropriate. I don't think you meant to say
8 that.

9 MR. KESSLER: I'm sorry. That's not what I meant.
10 What I meant is if the opening contains the
11 propensity argument. Then that is something we would like.

12 MR. BRODSKY: I mean, we understand the Government
13 is going to open and the Government is going to say that
14 Mr. Shkreli -- the whole purpose of the scheme was Mr. Shkreli
15 had lied to MSMB investors. And so that's coming out in the
16 Government's case. And I don't know -- if the Government is
17 moving us to preclude from addressing the evidence that is
18 coming out in this case through Ms. Hassan, or other
19 witnesses, that Mr. Shkreli lied to them about performance --

20 MR. KESSLER: Not at all. Not at all.

21 THE COURT: I think the issue is whether you are
22 going to argue or open that Mr. Shkreli lied to Mr. Greebel.

23 MR. KESSLER: I'm sorry. If there was evidence of a
24 lie that Mr. Shkreli told to Mr. Greebel, so be it. We are
25 talking about the argument that how do you know Mr. Shkreli

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1 lied to Mr. Greebel? Because he lied to other people. That's
2 the argument that we're trying to preclude.

3 If that argument's not being made, then the motion
4 is moot. Then that's what the motion is directed to. That
5 suggestion that there must have been lies to Mr. Greebel,
6 because there were lies to others.

7 If there's a specific lie to Mr. Greebel, or a
8 general statement that Shkreli lied to Greebel, that doesn't
9 implicate the propensity argument.

10 MR. BRODSKY: Your Honor, you're not going to hear
11 us say, in opening or summation, that Mr. Shkreli must have
12 lied to Mr. Greebel because he lied to somebody else. What
13 you will hear us say is what the evidence shows. And I think
14 the evidence in the trial is going to show what we learned
15 from the last trial, which is that Mr. Shkreli lied to many
16 people, and Mr. Shkreli lied to MSMB investors. And we should
17 not be precluded from talking about the evidence in the case,
18 which will be Mr. Shkreli lying to people.

19 THE COURT: I do not think the Government has a
20 problem with that.

21 MR. KESSLER: No.

22 THE COURT: All right. We next have the Government
23 motion to preclude evidence about the circumstances of
24 Mr. Greebel's arrest.

25 You know, it does seem to me that it starts to sound

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1 like putting the Government on trial, which we are not going
2 to do and it is not appropriate to do. I am tending toward
3 granting this motion.

4 MR. BRODSKY: Well, if they are going to put in
5 post-arrest statements, then I think that moots the issue.
6 Because if somebody puts in post-arrest statements, then the
7 Government's going to argue that they're incomplete, or
8 they're inaccurate, or they're misleading, or anything else,
9 then the circumstances that led to that interview, the
10 background context that led to it, the actual interview
11 itself, the conditions of the interview, are all relevant.

12 During the post-arrest statement period, Special
13 Agent Braconi actually said multiple times to Mr. Greebel, I'm
14 off. I'm not sure what's going on. I woke up at five a.m.
15 and he was, in his own -- if you look at the entire
16 interview -- he himself was affected by the prior events.

17 I think the case law is clear. If they want to put
18 in post-arrest statements, then the conditions that led to
19 that are all admissible and it moots the issue. But if
20 they're not going to put in post-arrest statements,
21 Your Honor, we will not open on the issue. But we would ask
22 Your Honor to keep an open mind throughout the trial as to
23 whether or not evidence relating to the circumstances of
24 arrest go to reasonable doubt.

25 In other words, if the Government didn't do certain

1 things that resulted in not having certain evidence, then that
2 goes to reasonable doubt.

3 MR. PITLUCK: Your Honor, this is actually a wholly
4 new argument. This wasn't addressed in the brief; that
5 there's some sort of connection between the post-arrest
6 interview and the circumstances of the arrest. Regardless of
7 whether we introduce the post-arrest interview, the
8 circumstances of arrest are inappropriate, irrelevant. It
9 should be precluded. We're making that clear.

10 However, if we start to go into the province of the
11 arrest, then we're going to have to go into playing the actual
12 video so that the jury can see Mr. Greebel's behavior, his
13 demeanor firsthand, which we've now agreed to take out because
14 he was handcuffed. But that's abundantly relevant.

15 If you look at their brief, it does not reference
16 this issue at all. It just simply says it's relevant and they
17 cite no authority to preclude it.

18 We have cited authority to preclude it. We don't
19 believe it's relevant. Regardless of whether we plan to
20 introduce any post-arrest statements, it's just not
21 appropriate here.

22 MR. BRODSKY: Your Honor, of course it's
23 appropriate.

24 First of all, when we made our motion, when we
25 responded, they hadn't identified the post-arrest statements

1 yet. Their post-arrest statements came later in September,
2 where they identified them.

3 We have reason to believe -- and it sounds like they
4 are going to argue -- that what Mr. Greebel said was either
5 misleading or incomplete. How can it possibly be that if you
6 are awoken up at five a.m. and then you're brought to the FBI,
7 you're not told what the charges are. You're told in
8 general terms. You're not given the indictment. You're not
9 given any documents. This special agent himself is saying,
10 God, I'm exhausted. I'm losing myself. I don't know what I
11 am talking about.

12 How can it be that we can't introduce the context if
13 they're going to argue that Mr. Greebel should have remembered
14 several years ago what all the information was? When you're
15 wakened up in the middle of the night and you're dragged to
16 the FBI headquarters, of course it's relevant.

17 If they're going to argue -- and I don't know if
18 they are -- so if they don't argue it, then it becomes less
19 relevant. But if they argue that somehow his statement to an
20 FBI agent in the vicinity of a holding pen, where they have
21 him, you probably saw, chained to a bar in which two agents
22 are asking questions, and they're going to say that he was
23 asked about what happened three or four years ago, and that
24 what he did was omit some fact or omit something without being
25 shown any documents, how can it possibly be that we're not

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1 allowed to bring the context in?

2 It's just literally -- the Government wants to strip
3 the context and say this is what happened in this context.
4 This was not a deposition. This was an arrest in which he was
5 put in a holding cell, an area with this handcuffed chain, and
6 asked questions and answered them.

7 MR. PITLUCK: Judge, if they want to introduce
8 evidence of the circumstances of his arrest and the
9 post-arrest interview, we feel we are absolutely entitled to
10 introduce the video of Mr. Greebel's post-arrest interview.

11 THE COURT: Well, of course then it becomes an issue
12 in dispute and the jury has to sort it out.

13 MR. PITLUCK: Absolutely.

14 THE COURT: If that becomes an issue, they will have
15 to see that video.

16 MR. PITLUCK: They are entitled to address his
17 demeanor; whether he was answering those questions truthfully,
18 and in order to do that, they need to see him. So we can't
19 create this aura that he was under some sort of duress without
20 actually showing it to them.

21 So if that part comes in, then, Your Honor, our
22 position is it should all come in.

23 MR. BRODSKY: What we had asked the Government was
24 are you going to actually show him before a jury in handcuffs?
25 Because there's pretty good case law in the Second Circuit

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1 that if you are going to try not to demonize and dehumanize an
2 individual, you don't show him in handcuffs.

3 THE COURT: Well, I thought you were going to argue
4 that he was in handcuffs.

5 MR. BRODSKY: No, no. I'm not going to argue that.
6 I'm not going to introduce that.

7 THE COURT: I thought you just said that you were.
8 You were going to argue that he was chained and --

9 MR. BRODSKY: No, I'm sorry. I would not argue
10 that.

11 What I would argue is the context that led to it.
12 How much sleep did he get? What happened preceding the
13 interview? What was he told about the interview?

14 I'm not going to argue that because he was chained,
15 that he couldn't remember something. And I apologize for
16 bringing that up and creating the confusion.

17 THE COURT: All right. So maybe the Government can
18 put that little digital blurring thing on the handcuffs and
19 show the interview so it is not going to be shown. The jury
20 will not see him in handcuffs, but the room, the demeanor, the
21 conversation, the questions, the interchange, will be
22 something for the jury to decide.

23

24 (Continued on following page.)

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1 MR. PITLUCK: Judge, assuming that we have the
2 technical capability to do that, that's fine with us. We will
3 advise the Court if it's otherwise.

4 THE COURT: All right. Call one of the news
5 stations, see how they do it. I'm sure the FBI can figure it
6 out.

7 MR. PITLUCK: I'm looking at the agents, Judge.

8 THE COURT: They are very smart. I'm sure they can
9 figure it out.

10 All right now, the Government moved to preclude
11 evidence and details of Mr. Greebel's background. I think we
12 talked about that.

13 MR. BRODSKY: That was the husband, the father, they
14 didn't want that and you said it was okay.

15 THE COURT: Yes. Is he planning to introduce
16 character witnesses?

17 MR. BRODSKY: We do not know, Your Honor.

18 THE COURT: Okay.

19 Next, Mr. Greebel is going to produce their exhibit
20 list and documents that they will be introducing. So that is
21 resolved.

22 MR. DENERSTEIN: Your Honor, if it would be
23 possible, we have provided the Government with an index which
24 has Bates numbers on it. We would request more time to
25 physically produce the actual documents.

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1 MS. SMITH: You have our CD.

2 MR. KESSLER: We are confused because the pretrial
3 order requires the exhibits for today.

4 THE COURT: I thought you had said you would produce
5 them or I had ordered that they be produced tomorrow --

6 MR. DENERSTEIN: Tomorrow.

7 THE COURT: -- with source information. Mr. Brodsky
8 indicated he had that available.

9 MR. BRODSKY: I thought it was possible, then our
10 technical people tell us doing it tomorrow is challenging. We
11 provided them with a list. We will do everything to get it
12 tomorrow, but we are asking for some leeway in the case.

13 MR. DENERSTEIN: In all due fairness, Your Honor, we
14 have not said what our case is going to be. We are in a
15 slightly different posture. We are not trying to -- we will
16 make sure they have everything well in advance before we
17 present our case. I don't believe this will be an issue. We
18 are trying to narrow the list from a huge universe of
19 documents. I think we are saying we are using best efforts.
20 I just don't want -- I just want to be clear with the Court
21 and the Government.

22 THE COURT: We have had this order in place for
23 quite some time.

24 MR. BRODSKY: In all fairness, Your Honor, they're
25 getting our exhibits way in advance of any case-in-chief that

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1 we put on; whereas, they are giving their exhibits to us a
2 week and a few days before, and we don't even know who their
3 first week of witnesses are and we're not going to find out
4 until Tuesday, Wednesday of next week. So, in all fairness,
5 we are doing everything we can. We gave them a printout of
6 all the documents.

7 THE COURT: Don't you think the right thing to do
8 would have been to apply to the Court for an extension because
9 you were having an issue for some reason?

10 MR. BRODSKY: Yes, Your Honor.

11 THE COURT: I have ordered this. We have adjourned
12 this trial several times and we have adjourned the deadlines,
13 but certainly with all of the lawyers and the support at
14 Gibson, there should have been an effort made where you would
15 have been ready to provide and comply with the Court's orders
16 by today.

17 MR. BRODSKY: Yes, Your Honor.

18 THE COURT: So, if not Saturday, what, Monday?
19 Monday, noon?

20 MR. BRODSKY: Yes, Your Honor.

21 MS. SMITH: Your Honor, as I said before, we also
22 have hard copies for the Court in the back.

23 THE COURT: Thank you. You can leave them there.
24 Are there two copies?

25 MS. SMITH: Two copies of everything, the 3500 and

1 exhibits. Can we pick up the carts on Monday. We can leave
2 the carts for now. I will e-mail.

3 THE COURT: We will work it out.

4 We have defense experts. We have a lot of
5 litigation about that. I will say that I am going to grant
6 the Government's motion to preclude testimony of Bryan Garner.
7 I believe this is the linguistic expert who is purportedly
8 going to offer testimony to the jury about what Mr. Shkreli
9 and Mr. Greebel meant when they discussed different matters
10 and I think that would be a gross usurping of the jury's job
11 here, which is to look at the evidence and to decide disputed
12 issues about what the intentions were of the parties and I
13 don't think Mr. Garner's testimony is appropriately
14 admissible. The other issue is the testimony of Mr. Dooley.
15 He is supposed to be testifying about how the FBI conducts or
16 should conduct an investigation. Again, it is inappropriate
17 for the jury to consider the methodology of the investigation.
18 There is a specific instruction that is a standard instruction
19 to all jurors that they are not to speculate or wonder why
20 certain evidence was not presented or to second guess
21 investigatory techniques and it would be inappropriate for
22 them to hear from Mr. Dooley about the FBI's investigation.

23 So, with regard to the other experts, I would ask or
24 order, in fact, that the defense experts have to provide
25 information regarding their methodology, the documents or data

1 they considered and to provide a more fulsome disclosure as
2 required under Rule 16. I am not convinced that the defense
3 argument about who asked for what or who didn't ask is
4 appropriate. It appears that there are going to be experts
5 proffered by the defense and they do have an obligation to
6 make disclosures and I do not believe that the disclosures
7 thus far have been adequate. So if the defense wishes to
8 proceed with these experts, they will have to provide
9 additional disclosures or be precluded.

10 Now, you should have this information readily
11 available, so I would like to know when you can provide this
12 information to the Government. And I accept that there may be
13 adjustments to the opinions of the experts based on the
14 Government's case-in-chief, but certainly the methodology
15 should be disclosable by now.

16 MR. CHAN: I understand the Court's rulings on all
17 of these issues. In terms of timing, some are easier than
18 others. Some of our experts analyses are ongoing more so than
19 others. So I think that maybe if we can do a two-part
20 disclosure. The one we can do earlier, we will do on
21 Wednesday. The one that we need a little more time, we will
22 do by Friday.

23 THE COURT: October 11th and Friday the 13th.

24 MR. KESSLER: Your Honor, the only additional
25 request I have to that is can we know which of the experts are

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1 the easy and the hard so we know what to expect when?

2 THE COURT: Why don't we just name them so we can
3 have a so ordered list.

4 MR. CHAN: To put them in two buckets, the people
5 who are testifying based on their experience solely, so, for
6 example, Dean Ferruolo, who is testifying more on their
7 experience, we can do on the Wednesday bucket, people who are
8 like him.

9 People on Friday would be people who have to
10 actually manipulate and look at data and documents. Friday
11 would be more like Lewis, Johnson. I have to pull up my list
12 that I prepared for argument on this. One second.

13 THE COURT: Let's get it straightened out right now.

14 MR. CHAN: Klein, we can do on Wednesday. Gillers,
15 we can do on Wednesday.

16 THE COURT: Who?

17 MR. CHAN: Gillers.

18 THE COURT: Thank you. Wednesday.

19 MR. CHAN: Ferrante.

20 Garner, Friday. Wait. Did you just preclude
21 Garner, Your Honor? That makes that easier.

22 THE COURT: Garner is out and Dooley is out.

23 MR. CHAN: Did I cover eight?

24 MR. KESSLER: Six.

25 MR. CHAN: Minkoff, Wednesday.

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1 Smith, Wednesday.

2 THE COURT: I would just advise you to read the
3 Government's letter identifying specific deficiencies and
4 order that you provide that information to the Government on
5 Wednesday and Friday.

6 MR. CHAN: Yes, Your Honor.

7 THE COURT: Thank you.

8 Is there anything else? I think that's it, right?

9 MS. SMITH: Just to be clear, where and what time on
10 the 16th? Are we doing it in the ceremonial courtroom? If
11 you can just put it in an order so we know where to bring all
12 of the questionnaires.

13 THE COURT: We are going to do it in the ceremonial
14 courtroom because we can't fit everybody. Hopefully, we can
15 get it for two days if we have to. I'm really urging the
16 parties to look for a way to finish this in a day.

17 MS. SMITH: Do you want us at 9 o'clock?

18 THE COURT: Yes, 9 o'clock.

19 May I say to the jury consultant, sometimes jury
20 consultants will ask for permission to do social media
21 searches on the jurors.

22 MR. DUBIN: Yes, Your Honor.

23 THE COURT: I am very reluctant to the extent there
24 could be any footprint or disclosure to a jury that somebody
25 is looking on their Facebook who is not authorized to do it on

1 the Facebook owner.

2 MR. DUBIN: I can submit a letter to the Court, if
3 you'd like, by Tuesday. I think that we have an ethical
4 obligation to comply not only with recent ethics opinions that
5 guide us on how we need to go about that. I am keenly aware
6 if we look on a Facebook page, if it's a public page, that's
7 acceptable. If it's something that requires us to login,
8 thereby leaving a footprint, unacceptable. But as long as the
9 juror is making that information available, I think it is
10 incumbent upon us and even raises the specter of malpractice
11 if we don't do it. I'm happy to provide a letter to the
12 Court. But I think that we are duty bound do it. I think
13 that, again, recent ethic opinions require us to do it. I
14 think my letter will make that clear. I completely agree with
15 Your Honor that we cannot leave a footprint such that a
16 prospective juror or a sitting juror would know that we are
17 looking at information that they don't otherwise want looked
18 at.

19 Here's a good example, Your Honor: Linkedin, if you
20 are a member of Linkedin and you can look at other Linkedin
21 profiles and then that member whose profile has been looked at
22 knows Josh Dubin looked at your profile. If they have made
23 their page public and it doesn't require a login, there is New
24 York law and, you know, various American Bar Association and
25 other ethics' opinions that I'm sure the Court is aware of

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1 that, again, I think require us to do that due diligence on
2 behalf of Mr. Greebel, but I will make our position clear.

3 THE COURT: In that situation with LinkedIn, if it
4 is a public page, is there a footprint --

5 MR. DUBIN: If it is a public page, no.

6 THE COURT: -- of who logged in and looked at them?

7 MR. DUBIN: No, they cannot. And, listen, we bear
8 the responsibility and I am more sensitive than I care to
9 admit to ensure, A, it is not a good look, first of all, that
10 they're being looked at. And, second of all, we have an
11 ethical obligation not to do that.

12 THE COURT: All right.

13 MR. DUBIN: Just so the Court is aware, I will be
14 staying through the duration. I happen to be an attorney, as
15 well as you know because I entered an appearance. I will be
16 staying throughout. I don't know. Maybe it's me just like
17 feeling oh, a jury consultant. I'm a lawyer.

18 THE COURT: You made that clear in the beginning.

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20 (Continued on next page.)

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1 (Continuing)

2 THE COURT: You made that clear from the beginning.

3 MR. DUBIN: Your Honor, the last thing is I noticed
4 at the first trial that there was a metal detector outside of
5 the courtroom itself. That concerns us. And I don't know if
6 that was in response to Mr. Shkreli, but it didn't seem like
7 that was going on for other trials.

8 Our concern is that although jurors don't enter the
9 courtroom that way, that they do pass in the hall from time to
10 time, and if they see a metal detector outside the courtroom,
11 that that somehow raises the inference in their mind that, you
12 know -- and especially since it's not outside other
13 courtrooms -- that there's some sort of danger, that
14 Mr. Greebel could be some sort of danger, or that this case
15 has some significance that we feel it doesn't.

16 So we just want to know if Your Honor planned on
17 installing that security measure at this trial as well.

18 THE COURT: The reason that we did it was not to --
19 not because we had concerns that there would be weapons
20 brought into the courtroom, or something that could harm or
21 jeopardize the security of the courtroom. Rather, it was
22 really to make sure that folks, other than the attorneys, did
23 not bring recording devices into the courtroom.

24 The sketch artists were ordered not to draw pictures
25 of the jurors, and they were not allowed to bring their

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1 devices into this courtroom. Only lawyers who were counsel of
2 record were allowed to do that.

3 I do not expect there to be as much media attention
4 to this case. I know you have raised that specter, but it
5 just does not feel like a likelihood. I was not planning to
6 have metal detectors outside, but I would require that those
7 who are not counsel surrender their phones.

8 MR. DUBIN: Very well, Your Honor.

9 THE COURT: With the exception of the supervisor.
10 So if the U.S. Attorneys wants to bring her phone, she's
11 allowed to do that.

12 MR. DUBIN: Understood, Your Honor, thank you.

13 THE COURT: All right. Is there anything else?

14 MR. BRODSKY: Is it okay if Mr. Greebel's wife
15 attends the trial? Could she have her phone if there's some
16 contact and the kids...

17 THE COURT: Our rules are that only lawyers can have
18 phones in the courthouse.

19 MR. BRODSKY: Understood. Okay, Your Honor.

20 MS. SMITH: Your Honor, I only raise this because
21 Mr. Greebel's wife was on the original witness list. I don't
22 know if she's going to be on the future witness list; but
23 generally potential witnesses are not in the courtroom for
24 trial.

25 THE COURT: Right.

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1 MS. SMITH: So I just wanted to raise that. I don't
2 know whether that's going to be an issue or not.

3 MR. BRODSKY: Well, if she was going to be a
4 witness, she wouldn't be a percipient witness. She would only
5 be a character witness. Therefore, I don't think that, with
6 respect to a spouse, that should be an exception. But if
7 Your Honor is asking us to make a determination before the
8 trial whether the wife is going to take the stand or not, we
9 will make that determination.

10 THE COURT: All right.

11 MR. BRODSKY: You want us to make that
12 determination?

13 THE COURT: Yes, if you would.

14 MR. BRODSKY: Okay, Your Honor. So if she's present
15 for the trial, she will not be a witness.

16 THE COURT: Well, it is the general rule, because I
17 know experts do not have that restriction; but if a fact
18 witness or a character witness, generally would not be
19 present.

20 Now, I also recognize that the defendant has a right
21 to have family members here in their support, or to have
22 support from those friends or colleagues who may be
23 supportive; but they are generally not called as witnesses.

24 So I think it is really up to you and your client to
25 talk about this issue and decide what you want to do.

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1 MR. BRODSKY: Understood, Your Honor.

2 THE COURT: Okay.

3 Is there anything else?

4 MS. SMITH: No, your, thank you.

5 THE COURT: All right. Thank you.

6 ALL: Thank you, Your Honor.

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8 (Matter concluded.)

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